93-702

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NENITA S. VILLAR,
et al,

Petitioners

v.

CROWLEY MARITIME
CORPORATION, et al,

Respondents

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether – in this case where alien plaintiffs sued seven alien defendants and one non-alien, diverse defendant, the defendants, in removing the case to federal court, asserted that all seven alien defendants had been fraudulently joined because none of them were subject to the in personam jurisdiction of the Texas courts and the Plaintiffs timely filed a motion to remand on the ground that the defendants did not clearly show in their removal papers that there was "no possibility" that the state court could find in personam jurisdiction as to at least one of the seven alien defendants – the Supreme Court should, particularly in view of such important considerations as federalism, comity and removal/remand law, grant certiorari in order to resolve the following important issues:

1) Whether the federal district court should have <u>first addressed the remand motion before</u> addressing a motion to dismiss the seven alien defendants on the ground of alleged absence

of in personam jurisdiction filed by the defendants? In addressing this issue, the Court would be resolving a conflict between a Panel Majority of the Fifth Circuit on the one hand, and the Seventh Circuit on the other hand, the Panel Majority of the Fifth Circuit in this case holding that the court can first address the in personam jurisdiction motion, and the Seventh Circuit, in Allen v. Ferguson, 791 F.2d 611 (7th Cir. 1961), holding that the federal district court should first address the remand motion and, if it determines that the removing parties have not met their burden of showing that removal was justified, it should order the case remanded to state court, thus permitting the state court to address the question of "in personam jurisdiction". There is a particular need to address this issue because the effect of the holding by the Fifth Circuit Panel Majority in this case is to drastically and improperly shift the burden of proof, as discussed under 2) below.

2) The extent of the removing parties' burden to prove "fraudulent joinder", i.e.

whether the removing parties in this case had the burden to "clearly show" that there was "no possibility" that a state court could have found in personam jurisdiction as to at least one of the seven alien defendants or did defendants have some lesser burden. And whether, if the in personam jurisdiction motion is going to be considered in the removal/remand context, the "no possibility" burden remains on the removing parties or does the burden shift, as held by the Fifth Circuit Panel Majority, to the removed party to prove a prima facie case of in personam jurisdiction? By addressing the question of the appropriate burden in a case such as this one, the Court will be resolving apparent conflicts between Supreme Court law, as reflected in Wilson v. Republic Steel, 42 S. Ct. 35 (1921), and earlier Fifth Circuit cases such as Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983); B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); East Texas Mack Sales v. Northwest Acceptance Corp., 819 F.2d 1877 (5th Cir. 1987) and Laughlin v. Prudential Ins. Co., 882 F.2d 187

(5th Cir. 1989), and decisions of other circuits such as Polous v. NAAS Food, Inc., 959 F.2d 69, 73 (7th Cir. 1992), all squarely placing the "no possibility" burden, or similar burden, upon the removing parties in a fraudulent joinder case, and the decision of the Fifth Circuit Panel Majority in this case, holding in effect that, where the removing parties file an in personam jurisdiction motion immediately after removing the case to federal court, the burden shifts to the removed parties to prove a prima facie case of personal jurisdiction.

3) Whether the removed party, such as Petitioners in this case, should be granted the right to engage in discovery with regard to the remand motion and related motions such as the Respondents' in personam jurisdiction motion? In granting certiorari on this ground the Court would be resolving the severe conflict between the Panel Majority of the Fifth Circuit in this case, holding that Petitioners should not be allowed the engage in discovery with regard to such motions, and the decision of this Court in

Insurance Corp. of Ireland Ltd v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709, 102 S.Ct. 2009, 2107 (1982) and Oppenheimer Fund, Ins. v. Sanders, 437 U.S. 340, 351 n 13, 98 S.Ct. 2380, 2309 (1978) and other Circuit Court cases such as Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1st Cir. 1992); Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 425 (D.C. Cir. 1992); Eaton v. Dorchester Dev. Inc., 692 F.2d 727, 729 (11th Cir. 1982); Wells Fargo and Co. v. Wells Fargo Express Co., 556 F.2d 406, 431 n. 24 (9th Cir. 1977); and Lakkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971), and last, but not least, the dissent in this case, A130 to 144, 990 F.2d at 1500 to 1503, all holding that the removed parties such as Petitioners have the fundamental right to engage in discovery with regard to such motions. There is a particular need to address this point because, when the denial of discovery is coupled with the courts' action in addressing the in personam jurisdiction motion first and the consequent drastic shift in burdens, the removed

parties are essentially completely deprived of any opportunity to have the case remanded, thus violating the fundamental policy of strictly construing removal statutes and favoring, out of respect for federalism and comity, remand in doubtful situations, see Shamrock Oil & Gas Corp. v. Sheets, 61 S.Ct. 868, 872 (1941).

4) Whether the fact that the alien defendant GTO, Inc. ("GTO") was formally registered to do business in Texas, and had an office in Texas, at the time of the accident, makes GTO subject to the in personam jurisdiction of the Texas courts even though GTO terminated such registration after the accident occurred but before suit was filed? This Court has never specifically decided this issue, particularly where it is not clear whether the death of Mr. Villar was at least in part connected with GTO's activities in Texas, compare Hunter v. Mutual Resource Life Ins. Co., 31 S.Ct. 127 (1910); Connecticut Mutual Life v. Spradley, 19 S.Ct. 308 (1899) and Perkins v. Benguet Mining Co., 72 S.Ct. 413 (1952). By granting certiorari the

Court will not only be clarifying this important area of the law but will be resolving a seeming conflict among the circuit and federal courts, specifically the conflict between the Panel Majority of the Fifth Circuit decision in this case and Gutierrez v. Raymond Intern. Inc., 484 F.Supp. 241 (S.D. Tex., Hou. Div., 1979), on the one hand, holding that GTO would not be subject to the in personam jurisdiction of the Texas courts solely because it had been formally registered to do business in Texas at the time of the accident, and, on the other hand, the combination of these authorities: Connecticut Mut. Life Ins. Co. v. Spratley, and Perkins v. Benquet, (holding the federal constitution does not preclude Texas from imposing jurisdiction over a corporation such as GTO for causes of action not connected with its activities in Texas); Schlobohm v. Schapiro, 784 S.W.2d 355 (Tex. 1990) (holding the Texas Long-Arm Statute extends to the maximum limits permitted by federal due process); Texas law on corporate registration and cessation of registration, as

expressed e.g. in Art. 1396-8.13, Tex. R.C.S. (providing that a corporation that withdraws registration in Texas remains liable for debts or liabilities incurred while registered); Dalton v. Allied Van Lines, Inc, 900 F.2d 1196 (8th Cir. 1990) (holding that it is constitutional for a state to acquire personal jurisdiction over registered foreign corporations for a cause of action even though it did not arise out of corporation's activities within the state); 28 U.S.C. § 1359 (prevents parties from enlarging federal jurisdiction with actions after a cause of action arises); Deveck v. Japan CBM Corp., 877 F.2d 469 (2nd Cir. 1976) and Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469 (2nd Cir. 1976) (holding that 28 U.S.C. § 1359 creates presumption that actions of party claiming federal jurisdiction after cause of action arises are collusively done to create diversity). All of these authorities point toward the conclusion that Texas constitutionally can and does impose in personam jurisdiction over a corporation for causes of action arising while it is formally

registered to do business in Texas, even though it terminated its registration prior to suit and even though the cause of action may not have any direct connection with the activities of the corporation in Texas.

5) Whether the Court should grant certiorari with regard to the action of the district court and the Panel Majority of the Fifth Circuit in completely disregarding the affidavit of John Runion? While the affidavit did contain irrelevant legal conclusions, it also contained factual statements based upon personal knowledge and factual opinions which were supported by his knowledge and experience in dealing with the CMC Respondents and other maritime multi-nationals. Such affidavit in itself created a prima facie case of in personam jurisdiction over CMI, SATOL and GTO or, at the very least, the affidavit, when considered with the deposition testimony of the Respondents' own officers, surely created the "possibility" that a Texas state court could find personal jurisdiction over CMI, GTO and/or SATOL. Should

the Court grant certiorari on this issue, it would not only be addressing the important and fundamental issue of the right of parties to have their evidence considered but it would be resolving the conflict between the decision of the Fifth Circuit Panel Majority in this case, holding that the affidavit should be disregarded, and such Circuit Court decisions as Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 545 (1984); Payton v. Abbott Labs, 780 F.2d 147, 155-56 (1st Cir. 1985) and In Re Japanese Electronic Products, 723 F.2d 238 (3rd Cir. 1983) and earlier Fifth Circuit decisions such as Poteet v. Dow Chemical Co., 868 F.2d 1428 (5th Cir. 1989); Osbourn v. Anchor Laboratories, Inc., 825 F.2d 908, 915, 916 (5th Cir. 1987) and Christopherson v. Allied - Signal Corp., 939 F.2d 1106, 1110 (5th Cir. en banc 1991), all indicating that an affidavit such as Mr. Runion's should be considered and that the courts below should not have stricken it.

6) Whether in this case – where Crowley

Maritime Corporation ("CMC"), an American multi-national based in California, was parent of three wholly or partially owned foreign subsidiaries, Crowley Maritime International, Inc. ("CMI"), GTO and Saudi Arabian Transportation Offshore Limited ("SATOL"); it was undisputed (by testimony of Respondents' own witnesses) that CMC's officers and personnel held almost all of the managerial positions in CMI, GTO and SATOL, including those involving the day-to-day activities of the lighterage operation in Saudi Arabia, the operation in which Mr. Villar was working when he drowned; where, as Mr. Runion stated by affidavit, CMC's worldwide activities through subsidiaries, including its lighterage operation in Saudi Arabia, were highly centralized and dominated by CMC; where the fact that CMC's foreign subsidiaries are so dominated by CMC that they are the alter ego business conduit of CMC had already been determined by another Texas court in a case involving CMC, and that judgment had become final after CMC had had more than an adequate opportunity to present its side of the

case; where it is further undisputed that, shortly after the accident in question, CMC bought out the other two joint-venture partners in GTO, changed the name to WTO, WTO became the wholly-owned subsidiary of CMC, the lighterage operation in Saudi Arabia was shut down, SATOL was terminated as an active entity and almost all of the assets of the CMC/GTO/SATOL operation were transferred to CMC; where a prima facie case clearly exists with regard to CMC's domination of SATOL, GTO and CMI, to the extent that the presence of CMC in Texas (CMC has been formally registered in Texas at all material times, since before 1977, when the accident occurred, to and through the present) constitutes, through alter ego and/or agency principles and/or through the concept of joint contacts with Texas, the presence of SATOL, GTO and CMI in Texas for in personam jurisdiction purposes – the Supreme Court should grant writ of certiorari in order to clarify this important area of in personam jurisdiction/fraudulent joinder law and determine whether the foregoing undisputed facts and

circumstances compel the conclusion that there was at least a "possibility" that a Texas state court could find in personam jurisdiction as to either SATOL, GTO or CMI, thus defeating Respondents' claim of fraudulent joinder? In granting certiorari on this question, the Court would also be resolving conflicts between the decision of the Court of Appeals in this case, holding that such facts and circumstances do not even create the "possibility" that the state court could find in personam jurisdiction against SATOL, GTO or CMI, and the combined effect of the decisions in Product Promotion Inc. v. Cousteau, 455 F.2d 483 (5th Cir. 1974); Reul v. Sahara Hotel, 372 F.Supp. 995 (S.D. Tex. 1974); Castleberry v. Branscum, 721 F.2d 270 (Tex. 1986); Hargrove v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983); Gentry v. Credit Plan of Houston, 528 S.W.2d 571 (Tex. 1985); Torregrossa v. Szek, 603 S.W.2d 803 (Tex. 1980); Rittenhouse v. Mabry, 832 F.2d 380 (5th Cir. 1987); Hitt v. Nissan Motor Co. Ltd, 399 F.Supp. 838 (S.D. Flo. 1975); Beecham v. Pippin, 868 S.W.2d 356 (Tex.

App.—Austin 1985), no writ); Wells Fargo & Co. v. Wells Fargo Corp. Co., 556 F.2d 406, 419 (9th Cir. 1977); Cabalcetta v. Standard Fruit, 883 F.2d 1553 (11th Cir. 1989); Dudley v. Smith, 804 F.2d 979 (5th Cir. 1975); I.A.M. National Pension Fund Benefit Plan v. Wakefield Industrial Inc., 699 F.2d 1254 (D.C. App. 983); Cavic v. Ground Ball Bahama Dev. Co., 701 F.2d 879 (11th Cir. 1983); Stanley v. Globemaster, Inc. 400 F.Supp 1325 (D.C. Mass 1975); Koupetoris v. Konkor Intrepid Corp., 402 F.Supp. 951 (D.C. N.Y. 1975), aff'd, 535 F.2d 1392 (2nd Cir.); Bamford v. Hobbs, 569 F.Supp. 160 (S.D. Tex., Hou., 1983); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F.Supp. 483 (D. Kan 1978); Marsh v. Kitchen, 480 F.2d 1270 (2d Cir. 1973); U.S. v. Montreal Trust Co, 358 F.2d 239 (2nd Cir. 1966); Quarles v. Fuquels Industries, Inc., 504 F.2d 1358 (10th Cir. 1974); Harris v. Derre and Co., 223 F.2d 161 (4th Cir. 1955); Maritime Transport. Overseas v. Saudi Arabia Res. & Dev., 507 F.Supp. 701 (S.D. Tex. Hou. Div. 1981); Zwick v. Recvo Drug Store, 580 F.Supp. 64 (W.D. Pa. 1984); and American

General Fire & Cas. Co. v. Wal-Mart, 791 F.Supp. 763 (W.D. Ark. 1992), all holding or suggesting that an entity that is legally present and/or registered in the state can subject a foreign entity with which it has a relationship (e.g. parent, subsidiary, agent or principal), to the in personam jurisdiction of the court by virtue of such theories as alter ego and/or agency or quasi-agency and/or joint contacts.

7) Whether the undisputed fact that vessels of the alien Defendant Fednav sailed in and out of the Texas ports created at least the "possibility" that Fednav could be found by a Texas state court to be subject to its in personam jurisdiction. In granting certiorari the Court would be resolving the apparent conflict between the holding of the Fifth Circuit Panel Majority in this case – that shipping contacts with the state do not even present the "possibility" of in personam jurisdiction – and cases such as Szabo v. Smedvig Tankredri, 95 F.Supp. 519 (S.D. N.Y. 1951) and Allenque v. Gulf and So. America S.S. Co., 103

F.Supp. 34 (S.D. N.Y. 1952), implying that shipping contacts such as these would create at least a possibility of in personam jurisdiction.

II.

Whether, in a case such as this one, where the Plaintiffs have filed suit in the state court and the defendants have removed the case to federal court by asserting that the federal court had diversity jurisdiction, but, once the case has been removed, the defendants immediately ask the federal court to decline such jurisdiction and dismiss the case on ground of forum non conveniens, the federal district court, if it decides it should decline jurisdiction on such ground, should remand to the state court, rather than dismissing the case? The Court, if it grants certiorari on this question, would be resolving conflicts among the federal courts and other authorities. See Murray v. Union Pac. Ry. Co., 77 F.Supp. 613 (D.C. Ill. 1948); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); 76 C.J.S. Removal of Cases, § 266; 1A Moore's Federal Practice, Removal Procedure, § 0.169[1]

pp. 684, 685; and the analogous "pendant jurisdiction" cases, e.g. Carnegie-Mellon v. Cohill, 108 S. Ct. 614, 621-22 (1988), all pointing toward the view that the court should remand instead of dismissing, and Nolan v. Boeing, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 111 S.Ct. 1587 (1991); Bano Bi v. Union Carbide Corp., 984 F.2d 582 (2nd Cir. 1993), cert. denied, — S.Ct. — (1993); De Aquilar v. Boeing, 806 F.Supp. 139 (E.D. Tex. 1992) (pending appeal No. 92-5099 in the Fifth Circuit), and the Panel Majority in this case, holding that the court should dismiss rather than remanding.

III.

Whether the Supreme Court should grant certiorari with regard to the forum non conveniens dismissal in order to determine the important question, which has long been pretermitted by this Court, see Gulf Oil v. Gilbert, 67 S. Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 262 (1981), of whether, under Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938), the federal

court should, in a diversity case, apply state forum non conveniens law where the application of federal forum non conveniens law would make a difference in the outcome? In connection with this issue, certiorari is appropriate in order to achieve a uniformity of decisions in the federal courts by resolving the conflict between the Second Circuit opinion of Judge Learned Hand in Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), holding that state forum non conveniens law should be applied by the federal courts under these circumstances, and the Fifth Circuit decisions of the Panel Majority in this case and the full Court in In re Aircrash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, reinst. save as to dams., 883 F.2d 17 (5th Cir. 1989); and the Eleventh Circuit decision in Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), holding that federal forum non conveniens law should apply under these circumstances.

IV.

Whether, even if federal forum non conveniens law were deemed to apply, it is time for the Supreme Court to reexamine the forum non conveniens doctrine in the light of the facts of this case and the realities of the present world; to resolve conflicts and bring about a uniformity of decisions among the federal courts; to ascertain whether the doctrine has been applied discriminatorily; and to determine whether the lower federal courts have carried the doctrine far beyond the concepts originally intended by this Court? In order to carry out such reexamination, the Court would be resolving the following important issues: 1) Whether a forum non conveniens dismissal in this case, by the California federal court over nine years ago, constitutes res judicata or collateral estoppel as to that issue in this case where the Respondents, who had the burden on the issue, did not offer one scintilla of evidence as to whether the circumstances relevant to the issues – such as the location of the witnesses and proof – are

the same as ~~they~~ were nine years ago, and the Petitioners, who wanted to develop the record on such issues, were not permitted to engage in any discovery; where there is proof in the record indicating that there are now more witnesses and proof in or near the U.S. than any other country; and where the federal court in California did not address the question of whether a forum non conveniens dismissal would be appropriate under Texas state forum non conveniens law?

2) Whether, in view of Piper v. Reyno, 102 S. Ct. 252 (1981), which held that stipulations are relevant to the forum non conveniens determination, the courts below erred in ignoring, as they did, the stipulations tendered by Petitioners to the effect that: Petitioners would, at their own expense, bring Ms. Villar and her children to the U.S. for depositions and examination by American-based psychologists and experts of Respondents' choice; that Petitioners would use only American liability and damages experts, easily available for depositions and trial in the U.S.; and

Petitioners would pay the expenses of counsel for the Respondents to go to the Philippines or Saudi Arabia to take any depositions of relevant witnesses located there (of which there are probably none)?

3) Whether it is an abuse of discretion for the courts below to have granted and affirmed a dismissal on ground of forum non conveniens in a case such as this one, where the enterprise in the foreign country (Saudi Arabia) which gave rise to the accident in question has been discontinued; most, if not virtually all of the relevant witnesses have left Saudi Arabia; the vessels on which the accident occurred have long since departed, along with their crew; most of the witnesses, being Americans, are now located in the U.S.; the others, such as members of the crew, are apparently located with the primary vessel in the Gulf of Mexico, a lot closer to Texas than to Saudi Arabia; there are no witnesses in the Philippines except the Petitioners, who have volunteered to come, at their own expense, to the U.S. for both

depositions and trial; the Respondents offered absolutely no evidence with regard to the question of convenience and the present location of the witnesses; and thus the only evidence in the record at the time of filing and/or determination of the present motion overwhelmingly establishes that it is much more convenient for this case to be tried in the U.S. than in Saudi Arabia or the Philippines where there are virtually no witnesses or evidence at all?

4) And whether, in view of the actual effect of the forum non conveniens doctrine in today's world – its outcome determinative impact, as discussed by Justice Doggett in his concurring opinion in Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 680-89 (Tex. 1990); the realities of modern travel, communications, faxes, telephone depositions and the general use of depositions and discovery in international cases; the adverse impact upon safety that the application of the forum non conveniens doctrine has (by effectively immunizing American multi-nationals from

liability for injury to, or death of, their foreign workers or victims, the consequence is a lowering of global safety standards); the xenophobic and discriminatory consequences of the doctrine's application; the public interest need to monitor and regulate, through the American courts, the conduct of the American multinationals around the world; and the ultimate fact of life that the American forum, with its contingent fees, jury trials, modern discovery procedures and fair liability and damages laws, is really the only jurisdiction able to handle a truly international case in a just way — it would be propitious for the Court to reexamine the doctrine and, we submit, substantially narrow and clarify its application?

V.

Whether — in view of the importance of the issue of Rule 11 sanctions and its potential to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories", and the need to resolve conflicts among the circuit courts, in particular the decision of the Panel Majority of

the Court of Appeals in this case, holding that, even though every position taken by counsel for Petitioners was either supported by Fifth Circuit and/or Supreme Court law or the Supreme Court had not yet decided the issue and opinions of other courts supported the Petitioners' positions, it would nevertheless severely sanction Petitioners' counsel in the amount of $51,747.53 and decisions such as Thomas v. Capital Sec. Serv. Inc, 836 F.2d 866 (5th Cir. 1988) (en banc); Smith v. Our Lady of the Lake Hospital, Inc., 960 F.2d 439 (5th Cir. 1992); Cooter & Gel v. Harmarks, 110 S.Ct. 2447, 2457-58 (1990); Mareno v. Rowe, 910 F.2d 1043 (2nd Cir. 1990); Davis v. Carl, 906 F.2d 533 (11th Cir. 1990); Westlake North Property Owners v. Thousand Oaks, 915 F.2d 1301, 1307 (9th Cir. 1990); Teamsters Local Union No. 430 v. Cement Express Inc., 841 F.2d 66 (3rd Cir. 1988); U.S. Industries Inc. v. Touche Ross Co., 854 F.2d 1223 (10th Cir., 1988); and Schaefer v. Transportation Media Inc., 859 F.2d 1251 (7th Cir. 1988), all holding that, in situations reasonably similar to those that exist in this

case, sanctions would not be proper because the positions taken by counsel were "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" — this case is an appropriate one for the grant of writ of certiorari?

INTERESTED PARTIES

Nenita S. Villar, Petitioner

Josephine Villar, Petitioner

Gerardo Villar, Petitioner

Reynaldo Villar, Petitioner

Renerio Villar, Petitioner

John O'Quinn, Attorney for Petitioner

Benton Musslewhite, Attorney for Petitioner

Gary Riebschlager, Attorney for Petitioner

Crowley Maritime Corporation, Respondent

GTO Corporation, n/k/a WTO Corporation, Respondent

Genstar Corporation, Respondent

Fednav Ltd., Successor in Interest by Merger to Federal Commerce & Navigation Ltd., Respondent

Federal Pacific Ltd., Respondent

Ross Insurance Limited, Successor In Interest to Genstar Overseas, Limited, Respondent

Saudi Arabian Transport Organization Ltd., Respondent

Jack L. Allbritton, Attorney for Respondents

Fulbright & Jaworski, Attorneys for
Respondents

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the federal district court, dated January 7, 1992, is attached as App. A, A-1 to A-87, see also, 790 F.Supp. 1467 (S.D. Tex. 1992).

2. The opinion of the Court of Appeals, dated May 25, 1993, is attached as App. B, A-88 to A-144, see also, 990 F.2d. 1489 (5th Cir. 1993).

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals was entered on May 25, 1993. A petition for rehearing and rehearing en banc was timely filed and was overruled on June 30, 1993. App. C, A145-47). This petition for writ of certiorari has been timely transmitted within ninety days of the order overruling the motion for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of 28 U.S.C. §§ 1441, 1446 and 1447, the removal/remand statues; Section 17.044 of the Texas Civil Practice and Remedies Code; Section 71.031 of the Texas Civil Practice and Remedies Code, (the "Open Forum Statute"); 28 U.S.C. § 1359; and

TEX. REV. CIV. STAT. 1396-8.13 and 8.13 (7).

I. Statement of the Case

A. Course of Proceedings and Disposition in Court Below.

In March of 1977, the decedent, Renerio Z. Villar, a seaman aboard the Tug Bannock, was ordered by his captain to board Barge 204 to secure the barge to its buoy mooring line, from which it had broken loose. Having been provided with no safety line, he fell into the sea while trying to secure the barge and tragically drowned, leaving a widow and four children.

The Tug Bannock was "dedicated" to a Liberian corporation, then called GTO Corporation

("GTO"), which was then one-third owned but almost totally controlled by a Delaware corporation called Crowley Maritime Corporation ("CMC") and its wholly-owned subsidiary Crowley Maritime International, S.A., a Panamanian corporation ("CMI"). GTO and CMI shared home offices with CMC at One Market Place, San Francisco, California; their officers and boards were interlocked; GTO and CMI were "corporations of convenience," in that they maintained no operating offices at the places of their registration, Liberia and Panama, but instead were operated by CMC out of San Francisco and its other offices (one of which was in Texas) and the key management positions in GTO and CMI were occupied by CMC people.

GTO owned the controlling interest in a company called Saudi Arabia Transport Organization Limited ("SATOL"), which conducted a lighterage operation in the Persian Gulf, off the coast of Saudi Arabia. The Tug Bannock and Barge 204 were involved in this lighterage operation at the time of Mr. Villar's drowning.

Again, almost all of the key management positions in SATOL were occupied by CMC people, right on down to those in charge of the day-to-day activities.

While the Tug Bannock carried a Panamanian flag, it is undisputed that it was a "flag of convenience" and that the de facto flag of the Bannock was that of the United States. Barge 204 was directly owned by CMC and carried the American flag. Mr. Villar was nominally employed by P.A.C. International, S.A. ("PACI"), a Panamanian corporation based in Singapore used to provide maritime personnel for the lighterage operation. Mr. Villar's contract provided, if injured or killed, that he or his survivors could recover under the law of the Philippines or the law of the flag of the vessel, whichever would be more beneficial to Mr. Villar and his family.

The Villars first filed suit in the United States District Court in San Francisco. That court found that U.S. maritime law did not apply and dismissed the case on ground of forum non conveniens. The Ninth Circuit affirmed, 782 F.2d

1478 (9th Cir. 1986), and, in doing so, held that American law did not apply, but did not determine which foreign law would apply. 782 F.2d at 1482. The Villars then filed suit in the state court of California and that court dismissed on ground of forum non conveniens and such dismissal was affirmed by the California state court of appeals, primarily on the ground that the state court should decide the forum non conveniens issue as the federal court had decided it, indicating that California state and federal criteria were generally the same. See Ex. C to Motion to Dismiss of CMC; Record in Court of Appeals ["R."] at 76.

The Villars thereafter timely filed suit in the state court of Texas. The Villars sued CMC, CMI, GTO, SATOL and four other foreign corporations. One of the other four was Fednav Ltd. ("Fednav"). The defendants frivolously removed the case to federal court. App. D and E, A148-60; R. at 31-24. The removal was based upon one ground, diversity of citizenship, and, though implicitly acknowledging that the presence of any

one of the seven alien defendants would preclude removal (plaintiffs also being aliens), see Chick Kam Choo v. Exxon, 764 F.2d 1148 (5th Cir. 1985) ("Choo II") and Cabalcetta v. Standard Fruit, 883 F.2d 1553 (11th Cir. 1989), defendants sought to legitimize a removal that was patently improper by making the conclusory, unsupported assertion that "all of the co-defendants are alien corporations or companies, who have been fraudulently named as defendants in an attempt to defeat or destroy diversity jurisdiction." A154.

The plaintiffs quickly filed a Motion to Remand. R. 101-95. Citing Choo II, 764 F.2d at 1149, the plaintiffs observed that the presence of alien Plaintiffs versus just one alien defendant absolutely prohibited removal and then stated that defendants' assertion that every one of the alien defendants had been fraudulently joined was nothing more than a naked, conclusory, unsupported allegation that did not even come close to satisfying the defendants' heavy burden of "clearly proving" that there was "no possible way" that plaintiffs could establish in personam

jurisdiction over any one of the alien defendants in the state court. Id.

Plaintiffs also filed a supporting brief, (R. 148-113, and deposition excerpts, documents and an affidavit. R. 361-160 and see John Runion's affidavit, App. F, A161-191, discussed in detail below.) Essentially those filings establish that CMC had an office and registered agent for service of process in Texas at the time of the accident and at the time of the filing of this suit; GTO had an office and registered agent for service in Texas at the time of the accident; CMC had an agency and parent-subsidiary relationship with GTO, CMI and SATOL and the activities of CMC in Texas, as parent and agent of GTO, CMI and SATOL, were sufficient to establish a prima facie case of in personam jurisdiction in Texas over all three of said alien defendants (CMI, GTO and SATOL); and that the post-accident transfer of the assets of GTO, CMI and SATOL, the post-accident termination of those companies as active, viable businesses, the initial inadequacy of capitalization of GTO, CMI

and SATOL, and the general dominion and control exercised by CMC over GTO, CMI and SATOL, all demonstrated that, at the very least, defendants could not satisfy their heavy burden to "clearly show" that there was "no possible way" that the state court of Texas could have asserted in personam jurisdiction over GTO, CMI and/or SATOL by and through, or with, CMC.

The defendants filed a response brief and affidavits, deposition excerpts and documents. The deposition excerpts and documents were essentially the same as those filed by the plaintiffs and simply demonstrated that, in essence, the proof of general dominion and control exercised by CMC over CMI, GTO and SATOL is undisputed. The affidavits filed by defendants were conclusory and unhelpful, except for the affidavit of M. E. Chlumecky, discussing how the vessels of Fednav, one of the other four alien defendants, frequently sailed into Texas ports. See "Chlumecky Affidavit", Exhibit F to Defendants' Opposition and Response to Plaintiffs' Motion to Remand.

The alien defendants also filed a motion to dismiss their cases on the ground that the court had no in personam jurisdiction over them and CMC filed a motion to dismiss on ground of forum non conveniens. See R. at 64-50 and 94-91. Subject to their motion to remand to state court, the plaintiffs opposed these motions, R. 491-476, and expressly requested time to engage in discovery with respect to both motions.

The district court, erroneously ignoring plaintiffs' plea that it should first address the plaintiffs' motion to remand in the context of the appropriate removal/remand burdens and tests, first addressed the alien defendants' motion challenging in personam jurisdiction over all seven of the alien defendants and, instead of placing the heavy burden upon the defendants to clearly prove that there was "no possibility" that a state court could find in personam jurisdiction as to any one of the seven alien defendants, as it should have done, the court shifted the burden to the plaintiffs to produce prima facie or preponderance of the evidence

proof of in personam jurisdiction as to the alien defendants. A-10-23, 55-56; 780 F.Supp. at 1472-1474, 1481. As to plaintiffs request that the court delay a decision on such motion so that plaintiffs could engage in discovery upon all issues pertaining to the pending motions, the district court callously refused to allow such discovery, even though it was undisputed that plaintiffs had engaged in no discovery in the prior proceedings in California or in the proceedings in the court below on the question of in personam jurisdiction in Texas or on the question of whether the present location of the witnesses and the proof made it more convenient at this time to try the case in the U.S. rather than in Saudi Arabia or Philippines. A47, 53; 780 F.Supp at 1480.

Therefore, the district court - refusing first to take up the question of remand and instead erroneously addressing the in personam jurisdiction motion first; applying the wrong burdens and tests; refusing to allow plaintiffs discovery with respect to the pending motions;

refusing to conduct an evidentiary hearing on such motions; and ignoring the fact that, even under in personam jurisdiction burdens and standards (instead of fraudulent joinder standards), the affidavit evidence and the deposition testimony from the California proceedings generated a prima facie case of in personam jurisdiction with respect to GTO, CMI, SATOL and/or Fednav - summarily and erroneously held that the court had no in personam jurisdiction over any of the foreign defendants, including GTO, CMI, SATOL and Fednav, and dismissed all of said defendants; then denied the motion to remand "as moot"; granted CMC's forum non conveniens motion; in violation of the Anti-Injunction statute, 28 U.S.C. § 2283, enjoined the plaintiffs from proceeding in any other American court; and, to top it off, sua sponte severely sanctioned the plaintiffs' lawyer. A-10 to 87; 780 F.Supp. at 1472-1487.

A Panel Majority of the Court of Appeals manifested an even more hostile attitude toward these foreign plaintiffs and their counsel. A-

88-129; 990 F.2d at 1489. The Panel Majority affirmed in all respects and, in affirming the in personam jurisdiction holding and sanctions, blatantly misconstrued Texas law. See discussion, infra, of comments of Court at A112, n. 8 and A127-128; 990 F.2d at 1496-97, n. 8 and 1500.

Judge Johnson of the Court of Appeals filed a vigorous dissent on the question of discovery, asserting that the district court's failure to give the plaintiffs the right to engage in discovery was contrary to "a host of . . . Fifth Circuit precedent" and to cases from other Circuits, and that the case should have been reversed and remanded to allow the plaintiffs their fundamental right to discovery. A130 to 140; 990 F.2d at 1500-03.

B. Evidence On In Personam Jurisdiction and Forum Non Conveniens Motions.

The key jurisdictional facts are really undisputed. The discussion of those "facts" by the district court, A38-A43, 780 F.Supp. 1478, 1479, erroneously consisted of an attempt to

glean from the depositions and record the evidence most favorable to the defendants while ignoring the overwhelming evidence in favor of the plaintiffs. This approach, of course, violated the district court's own later finding that plaintiffs failed "to make a prima facie showing that any of the Codefendants have continuous and systematic contacts with the State of Texas or that any of the Codefendants are the 'alter ego' of CMC." A56, 780 F.Supp. at 1481. Indeed, the district court's discussion often created misleading innuendos by its incomplete description of the evidence.[1] The rest of the district court's discussion of the "facts" was superficial – only touching upon the surface veneer of corporate appearances and not upon the substantive evidence underneath that surface.

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[1] For example, the district court stated that "(o)f course, CMC, through CMI, exercised some control over GTO, and through GTO, over SATOL, and some employees of both GTO and SATOL retained ties to CMC." A42, 780 F.2d at 1479. This is a gross understatement. As the statement of the undisputed facts herein reflect, all of the key managerial positions, both in San Francisco and Saudi Arabia, including those dealing with the day to day operations, were manned by CMC personnel. How the district court could say or imply otherwise is beyond our comprehension.

That substantive evidence consists of the deposition testimony of Dick Maguire, an American officer of CMC who had overall responsibility for the international group of CMC companies, including CMI, GTO and SATOL (Exh. I to Defendants' Opposition in Response to Plaintiffs' Motion to Remand, "Mag. Dep." at 7, 178, 19); George Watkins, American CMC officer who was, from his office in San Francisco, the key supervisor of the CMC/GTO/SATOL Saudi Arabian operation (Exh. J to Defendant's Opposition in Response to Plaintiff's Motion to Remand, "Wat. Dep." at 3 to 7); William D. McLean, another American CMC employee who was general manager of the CMC/GTO/SATOL operation in Saudi Arabia (Exh. K to Defendant's Opposition and Response to Plaintiffs' Motion to Remand, "McL Dep" at 5 to 8); and Rudolph Nazareth, head of PACI (Exh. L to Defendant's Opposition and Response to Plaintiffs' Motion to Remand, "Naz. Dep." at 10). In addition, the affidavit of John Runion, plaintiffs' factual expert (A161 to 191 and see Record for the attachments), was never

contradicted by defendants. The only additional relevant evidence produced by defendants was the Fednav affidavit. See Aff. of Chlumecky, supra.

These depositions and affidavits established the following undisputed facts:

1) That GTO was formally registered to do business in Houston, Texas and had an office in Houston at the time of the accident made the basis of this suit. (Mag. Dep. at 79; Runion Affidavit A 174 - 175).

2) That, after the accident in 1979, GTO was dissolved, terminated its registration in Texas and its name was changed to WTO; all of its assets and stock was acquired by CMC; and the GTO/SATOL operation in Saudi Arabia was completely shut down, with the personnel, vessels and other assets being moved out of Saudi Arabia. See Shipman affidavit filed on behalf of CMC companies, R. 365-363; Mag. Dep. 11-13, 47, 121-23; McL. Dep. 5, 81-83.

3) That the defendants offered no evidence to show that they complied with Texas statutes with regard to discontinuance of corporate

registration; no evidence was offered to show what happened to the assets and personnel in GTO's Houston office after it was shut down in 1979; and defendants offered no evidence to show that the discontinuance of the GTO registration and office was not done in order to create diversity, in violation of the rationale of 28 U.S.C. § 1359, in favor of its parent, CMC, in the event CMC were to be later sued in Texas. See entire record and discussion in footnote 15 infra.

4) That CMI, a wholly-owned subsidiary of CMC with an interlocking directorate, was a "corporation of convenience", with no operational office in Panama, its country of registration, but with its primary office in San Francisco, in the same office as CMC (One Market Place in San Francisco), Mag. Dep 8,9, and was incorporated with only $10,000 capitalization. Mag Dep. 108.

5) That GTO was also a "corporation of convenience" with no operating office in Liberia, its country of registration, and had its home office also at CMC's office, One Market Place in

San Francisco, Mag. Dep. 9, 22, and was incorporated with only $600 capitalization. Mag. Dep. 108, 109. As testified by Maguire, GTO was not really an operating company but a "paper company". Mag. Dep. 23, 24, 37, 38.

6) That SATOL, a Saudi Arabian corporation, was 60% owned by GTO and GTO was controlled by a joint venture agreement, R. 414-394, which provided for a Management Committee that was dominated by CMC people (such as Leo Coller).[2] Mag. Dep. 15-22. GTO controlled SATOL by appointing and controlling all but two of the nine person board of SATOL, Exh. 1 to Mag. Dep. and Mag. Dep. 43, and CMC appointed and controlled five of the nine positions on the GTO board (GTO had no officers). Mag. Dep. 26-31, Exh. 1 to Mag. Dep.

7) That PACI, while the nominal employer

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[2] Maguire testified as follows:

"Q. If you had to point to one man in the organization ... who would you say would be the key man?

A. Well, Leo Collar is the chief operating officer of Crowley; and flowing from his responsibilities there, when we're in anything, he's typically the chief man in whatever we're in."

of Mr. Villar, was not the de facto employer (the de facto employer was CMC/GTO/SATOL); PACI had no officers or supervisory personnel in Saudi Arabia; and PACI got the money to pay Mr. Villar and the crew from CMC/GTO/SATOL. Naz. Dep., R. 342-308; Wat. Dep. 34, 35 (PACI merely a "hiring-hall" company).[3]

8) That all of the key positions in the CMC/GTO/SATOL Saudi Arabian operation were held by CMC people: e.g. McLean was general director in Saudi Arabia, in charge of day-to-day operations, McL. Dep. 8; the general director's job, the key position in Saudi Arabia, was always held by a CMC person (in addition to McLean, George Tanner, George Seeley and Jack Mayor), Mag. Dep. 33, 35, 47, 52-54, 58, Wat. Dep. 29-33; John Pelton, a CMC American employee was in charge of financial matters, McL Dep. 16; purchasing was handled by a CMC American employee

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[3] Nazareth, in addition to the references above, testified that PACI is a Liberian company that officed in Singapore and was run by Americans, Solomon, Karscher and Donald Gordon (Dep. 13, 17, 18, 19); that Solomon is now in Los Angeles and Kascher is back in the U.S. (Dep. 20, 21); and, since 1980, PACI has been out of business (Dep. 14).

named Jerry Phillips, McL. Dep. 18; Vladimer Soloman, a CMC American employer, an operations manager, Cecil Payne, an American CMC employee, was also an operations manager and the port captain, Dave Hutton, also a CMC American employee, was the dispatcher of the vessels, and the captain of the Bannock was directly supervised by Solomon, Payne and Hutton. McL. Dep. 45-48, 54-57, 69, 96-103.

9) All of the essential corporate services for GTO and SATOL were furnished by CMC; these included "financial accounting - type direction", "assistance in recruiting individuals from the states", "financing for the operations", "advertising", supplies, sales, engineering, legal services, insurance and investigation services. Mag. Dep. 62, 65, 73-74, 78, 81, 95-96. McLean and others in Saudi Arabia coordinated day-to-day decisions with CMC people in San Francisco such as Collar and Watkins (via telex, telephone, mail, etc). McL. Dep. 13-14, 18.

10) The contract which governed the Saudi

Arabian lighterage operations was between SATOL and ARAMCO, the Saudi Arabian oil company dominated by four American oil companies (Chevron, Exxon and two others), and was negotiated by CMC employees McLean, Tanner, Watkins and Quinby, the latter being CMC's lawyer (based in San Francisco), Mag. Dep. 62-64; CMC ultimately received the proceeds from the contract and then forwarded money to Saudi Arabia to pay for operating expenses there. Mag. Dep. 47, 59-62, 66; McL Dep. 22, 29-32.

11) That the accident investigation was handled by CMC/GTO people out of the U.S. Mag. Dep. 95-97.

12) As to the location of the witnesses, Maguire testified that he did not know the nationality of the surviving crew but that the captain, Corpus, was a Vietnam refugee, Mag. Dep. 94-95; however, McLean testified that Tug Bannock and its crew were, as of the date of his deposition, working in the Gulf of Mexico, McL. Dep. 73, and all the other vessels used in the lighterage operation had been moved out of Saudi

Arabian waters. McL. 81-83.

13) John Runion, with personal knowledge as well as investigative knowledge, expressed the uncontradicted factual opinion that CMC, which maintained a highly centralized modus operandi, dominated CMI, GTO and SATOL to the extent that these subsidiaries were the alter-ego of CMC and vice-versa.

II. REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

A. Preliminary Statement.

This Court, we respectfully submit, should grant certiorari in order to deal with the ominous and growing use by American-based multi-national corporations of a judicial scenario that emasculates federalism, comity and traditional concepts of removal/remand law. They frivolously remove to federal court cases filed by foreign plaintiffs in the state court, and then prevail upon the lower federal courts to: address their dispositive motions <u>before</u> resolving the

plaintiffs' remand motion, thus drastically shifting the burdens upon the parties by the finesse of the remand motion, deny any right of discovery to the plaintiffs on such motions, improperly grant the dispositive motions; (such as an in personam jurisdiction motion); then deny or deem moot the remand motion; and ignore state forum non conveniens law and use federal forum non conveniens law to dismiss the case to oblivion.[4] This and other recent cases

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[4] We feel compelled to point out to the Court that we raised some of the same issues advanced in this Petition in Bano Bi v. Union Carbide, in which this Court recently denied certiorari. See action of S. Ct., Oct. 1993 (No. 93-64). While there are some similarities, we hasten to point out some very substantial differences in the two cases. We do not have, in this case, to contend with a statute and court-approved settlement adopted and entered in a foreign jurisdiction, that are potentially preclusive under the Act of State doctrine, as was the situation in Bano Bi. In this case, the evidence of contacts with the Texas forum by one or more of the alien defendants is far more conclusive than it was in Bano Bi. Indeed, the plaintiffs in Bano Bi had not had the fortuitous opportunity, as plaintiffs had in this case, to engage in discovery that produced evidence relevant to the questions of alter ego, agency and other grounds for having the registered parent constitute the presence of the alien subsidiaries for in personam jurisdiction purposes. In this case, see argument infra, it is absolutely clear – much more so than in Bano Bi – that defendants did not sustain their burden to "clearly prove" that there was "no possibility" that plaintiffs could prove in personam jurisdiction in the state court as to at least one of the seven alien defendants. To be sure, as we noted in the Statement of the Case above, in this case, unlike the Bano Bi case, one of the alien

demonstrate, we further suggest, an urgent need for the Court to comprehensively reexamine the forum non conveniens doctrine.

This case represents a real travesty. The district court, displaying injudicious animosity toward these foreign plaintiffs and their counsel, obviously resolved never to give plaintiffs a decent chance and then sanctioned their counsel for $52,747.53 for having the audacity to do his duty as an advocate to make every effort to obtain a trial on the merits in a venue that could provide real justice.

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defendants was indisputably registered to do business in Texas at the time of the accident made the basis of this suit. In this case, we are focusing one of our most urgent pleas for the grant of certiorari, see infra, on the basis of that issue, an issue not present in Bano Bi. And there was an issue in Bano Bi - not a viable one we said, but one that was raised by the defendants in that case nevertheless - that the plaintiffs waived the right to discovery, whereas in this case there is no issue at all about waiver. See dissent of Judge Johnson, A130 to 144, 990 F.2d at 1500 to 1503. Finally, as to the forum non conveniens issue, it was clear in Bano Bi that there were a number of relevant witnesses in India, both as to liability and damages, whereas in this case it is undisputed that there are no witnesses in Saudi Arabia where the accident occurred, and only the plaintiffs are in the Philippines and they have agreed to appear in the American Court for depositions and trial. The harshness and gross injustice of the application of the forum non conveniens doctrine is much more apparent in this case, than it was in Bano Bi.

B. The Fraudulent Joinder Removal.

1. The Tests and Burdens and Addressing The In Personam Jurisdiction First.

A very important question before the Court is whether or not it is going to reject the "no possibility" rule or adopt it as the firm law of the Court in fraudulent joinder cases.

In 1921 the Court, in Wilson v. Republic Steel, 42 S.Ct. 35 (1921), framed the test and burden in fraudulent joinder cases in these terms: fraudulent joinder must be shown by the removing party by "facts rightly leading to that conclusion (that joinder was fraudulent) apart from the pleader's deductions". The Fifth Circuit, up until this case, took the lead in further refining the tests and burdens in fraudulent joinder cases, stating in Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983) that:

> The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional

> facts. . . Having assumed that all other facts alleged by the plaintiff in this complaint are true, the court must then examine relevant state law and resolve all uncertainties in favor of the nonremoving party. Id. at 550. Viewing the state law in its proper perspective, if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, and that there is incomplete diversity, and that the case must be remanded to the state courts.

707 F.2d at 209; emphasis ours.[5]

But the district court in this case finessed the "no possibility" burden and test by deciding the in personam jurisdiction motion before addressing the remand motion, thus shifting the burden of proof to the Petitioners to prove a prima facie case with respect to in personam jurisdiction. A11-20; A55-57, 780

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[5] See also, East Texas Mack Sales v. Northwest Accept. Corp., 819 F.2d 116 (5th Cir. 1987); B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); and Laughlin v. Prudential Ins. Co., 882 F.2d 187 (5th Cir. 1989). Other circuits have also imposed a similar heavy burden upon the removing parties in fraudulent joinder cases. See, e.g. Polous v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992).

F.Supp. at 1473-74, 1481.[6] Mentioning Allen v. Ferguson, 791 F.2d, 611 (7th Cir. 1986) only in a footnote, n. 8 at A18 and 780 F.Supp at 1474, the district court based its holding upon the perplexing comment that "judicial economy favors deciding the Motion to Dismiss at the outset" and then revealed that it had employed a flawed rationale: it stated that if it remanded the case to state court, let the state court decide the in personam jurisdiction motion and the state court thence granted the motion as to all seven foreign defendants, "CMC, the remaining diverse

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[6] The "finesse" by the district court is revealed in the following language:

> On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the initial burden of establishing that jurisdiction exists. Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir. 1988); Nolan v. Boeing Co., supra, 736 F.Supp. at 127. Plaintiffs have failed to make a prima facie showing that any of the Codefendants have continuous and systematic contacts with the State of Texas or that any of the Codefendants are the 'alter ego' of CMC. Therefore, the Court finds that it cannot exercise personal jurisdiction over any of the Codefendants. The Codefendants' Motion to Dismiss is therefore GRANTED. With the departure of the Codefendants, complete diversity now exists between the Plaintiffs and CMC, the remaining Defendant. Therefore, the Plaintiffs' Motion to Remand is DISMISSED AS MOOT.

780 F.Supp. at 1481.

defendant, will, under applicable Fifth Circuit law, be unable to remove to this Court". 780 F.Supp. at 1474.[7]

The extremely disturbing aspect of that view, is not only that it may very well be based upon a totally erroneous rationale, but is one that clearly exceeds the traditional limits upon

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[7] The district court forgot to mention the "fraudulent joinder exception" to the "voluntary - involuntary rule". It is true that the provision of 28 U.S.C. 1446(b), allowing a removal thirty days after a party who would destroy diversity has been dismissed by the state court, has been construed to apply only to voluntary dismissals by the plaintiff, and not to dismissals brought on by actions of the defendant or by an involuntary ruling of the court. The fountainheads of the voluntary-involuntary doctrine are two decisions of this Court, Powers v. Chesapeake and O.Ry., 18 S.Ct. 264 (1898) and Whitcomb v. Smithson, 20 S.Ct. 248 (1900). However, as noted by the Fifth Circuit in Self v. General Motors Corp., 588 F.2d 655, 662 (5th Cir. 1978), these cases do not clearly "elucidate the contours of the doctrine." Moreover, an exception has developed which holds that where there has been a fraudulent joinder and the state court subsequently dismisses the defendant who destroys diversity, the remaining diverse defendant can then remove under section 1446(b). See Insigna v. LaBella, 845 F.2d 249, 254, 255 (11th Cir. 1988); Self DeBry v. Transamerica Corp., 601 F.2d 480 (10th Cir. 1979); and Poulos v. Naas Foods Inc., 959 F.2d 69 (7th Cir. 1992). While it is true that a number of cases do not recognize the fraudulent joinder exception, see, e.g. Katz v. Armatori, SPA, 718 F.Supp. 1508 (S.D. Fla. 1989) and Nolan v. Boeing, 736 F.Supp. 120, 123 (E.D. La. 1990), these conflicting cases, and the uncertainty that prevails with regard to this issue, simply demonstrate another reason why the Court should intervene in this case.

removal jurisdiction[8] and completely disregards the principles of federalism and comity.

In any event, the holding by the district court and the Panel Majority of the Fifth Circuit – see A88 to A144, 990 F.2d at 1489 to 1503, that the courts can finesse the heavy burden upon the removing parties to prove fraudulent joinder, by deciding the in personam jurisdiction motion first, is directly contrary to Allen v. Ferguson. The court in Allen stated:

> When a suit is removed on the basis of diversity of citizenship, the district court should verify the essence of the subject-matter jurisdiction at the outset of the litigation if it appears that complete diversity is lacking.

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[8] This Court stated in Shamrock Oil & Gas v. Sheets, 61 S.Ct. 868, 872 (1941):

> [T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such (removal) legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'

791 F.2d at 615-16 (emphasis ours). Noting that "federalism concerns tip the scales in favor of initially ruling on the motion to remand", the court then held that "the district court erred in deciding Ferguson's motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity." Id. at 615, 616. See also, Buyout v. Auto Club Ins. Assn., 704 F.Supp. 1060 (N.D., Ga., 1989) (citing and adopting Allen v. Ferguson) and Armstrong v. Alabama Power Co., 667 F.2d 1385, 1388 (11th Cir. 1982).[9] We urge the Court to intervene and

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[9] In a very articulate statement of the rationale for the holding in Allen v. Ferguson, the court in Armstrong stated:

> "The answer lies in the nature of removal jurisdiction – which is simply a method of transferring into federal court a state court suit containing a federal jurisdictional ground. It also lies in the balance between federal and state judicial power – a balance that requires the federal courts to give '(d)ue regard for the rightful independence of state governments' and to 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Romero v. International Terminal Operating Company, Supra, 358 U.S. at 380, 79 S.Ct. at 484, 3 L.Ed.2d at 386. Finally, it preserves the plaintiff's right to choose a state forum. To serve these purposes, the federal courts must carefully scrutinize the bounds of removal jurisdiction, even to the point of apparently impractical detail – for these details in the given case eventually guarantee higher goals in

resolve the conflict between the Seventh and Fifth Circuits on this important issue and hold clearly and unequivocally that, as held in Allen, a district court must always address the motion to remand first and determine whether it has subject matter jurisdiction.

Furthermore, it has been many years since this Court has specifically examined the law with respect to "fraudulent joinder". We respectfully urge the Court to grant certiorari in order to clarify whether the burden upon the removing parties is, and should always be, regardless of other pending motions, the "no possibility" rule in connection with removals based upon alleged "fraudulent joinders."

2. The Failure to Grant Discovery.

By coupling the finessing of the "no possibility" burden with the denial of discovery

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all cases."

667 F.2d 16 1388. See also, BancOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975); and Jones Store Co. v. Hammon, 424 F.Supp. 494, 499 (W.D. Mo. 1977). "The first order of business is for the federal court to determine its own jurisdiction". 1A Moore's Federal Practice, §0.129 [1] pp. 678, 679.

on the part of the Petitioners, the courts below, in a very brutal fashion, placed a virtually impossible, and possibly unconstitutional, barrier in the Petitioners' path. Most disturbing, in doing what they did, the courts below have, in violation of federalism and comity, essentially robbed the state courts of their lawful jurisdiction.

The dissent in the Court of Appeals in this case articulates better than we ever could, the need for certiorari with regard to the denial of discovery. See A130 to 144; 990 F.2d at 1500-03. Judge Johnson completely sweeps away the superficial rationalizations of the Panel Majority, particularly the claim that Petitioners should not be entitled to discovery in this case because of the discovery ten years earlier in the California litigation on the forum non conveniens motion pending in the California Court.[10]

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[10] Judge Johnson stated:

> The majority opinion states that '[t]he Villars also contend that the district court erred when it denied them additional discovery.' A130-131 and 990 F.2d at 1500. However, the record, the briefs, the district court's opinion and counsel

What is really important about Judge Johnson's dissent, however, is how he elucidates that the Panel Majority's affirmation of the district court's denial of discovery is squarely in conflict with decisions of the 1st, D.C., 11th, 4th and 3rd Circuits.[11]

Therefore, we urge the Court to grant certiorari and stem the recent rising tide of cases in which the courts have used a denial of discovery with a shift in burdens as instruments for preventing foreign plaintiffs from having access to the state courts and, further, to

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> for the parties themselves, all acknowledge that there has been absolutely no discovery in the case sub judice. While it is true that the parties engaged in discovery with respect to a forum non conveniens issue ten years ago in a California case, it is quite elementary that personal jurisdiction analysis and forum non conveniens analysis are completely different.

[11] Judge Johnson cited the following cases: Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1st Cir. 1992); Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991); Crane v. Carr, 814 F.2d 758 (D.C. Cir. 1987); Eaton v. Dorchester Development, Inc., 692 F.2d 727, 729 (11th Cir. 1982); Wells Fargo and Co. v. Wells Fargo Express Co., 556 F.2d 406, 431 n. 24 (9th Cir. 1977); Lakkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971); Fraley v. Chesapeake and Ohio Ry Co., 397 F.2d 1, 3, (3d Cir. 1968); Surpitski v. Hughes-Kennan Corp., 362 F.2d 254, 255 (1st Cir. 1966). 990 F.2d at 1502, n. 5.

resolve the conflict between the Panel Majority of the Fifth Circuit in this case, on the one hand, and the 1st, D.C., 11th, 4th and 3rd Circuits, on the other hand.

3. GTO's Formal Registration In Texas.

In Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S.Ct. 308 (1899), the defendant insurance company was formally registered, through the Tennessee Insurance Commission, to do business in Tennessee. During the time it was registered, it sold the subject policy of insurance but, after the policy was sold, the defendant withdrew from doing business in Tennessee. After such withdrawal, plaintiff filed suit on the policy against the defendant in Tennessee and the Court held that the defendant was subject to the in personam jurisdiction of the Tennessee Courts.[12]

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[12] See also, Mutual Reserve Fund Life Assoc. v. Phelps, 190 U.S. 147, 23 S.Ct. 707; Mutual Reserve Life Ins. Co. v. Birch, 200 U.S. 612, 26 S.Ct. 752 and Commercial Mut. Accid. Co. v. Davis, 213 U.S. 245, 29 S.Ct. 445. But see, Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573, 31 S.Ct. 127, 131-32 (1910), indicating that the cause of action may have to arise out of the business being done in the state.

Then, in Perkins v. Benguet Mining Co., 342 U.S. 437, 72 S.Ct. 413 (1952), the Court held that the due process clause of the 14th Amendment did not preclude Ohio from subjecting a foreign corporation to in personam jurisdiction in a case brought by an Ohio nonresident concerning matters unrelated to defendant's activities in Ohio.[13]

The decision in Hunter was cited as authority for the holding of the court in Gutierrez v. Raymond International Inc., 484 F.Supp. 241 (S.D. Tex. Hou. Div. 1979) to the effect that the court did not have in personam jurisdiction over an unlicensed foreign corporation in order to adjudicate liability of its foreign subsidiary arising out of acts unrelated to any business transacted in the forum state. The court in Gutierrez did concede that the holding in Perkins v. Benguet may have "eroded" the Hunter decision. 424 F. Supp. at

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[13] See also, State of Washington v. Superior Court, 53 S.Ct. 624 (1933) (holding that it is constitutional for a state to make the secretary of state the agent for a corporation after it withdraws from formal registration in the state or has had that registration terminated).

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Texas is a state which provides for assertion of in personam jurisdiction to the outer limits of constitutional due process. Schlobohm v. Shapiro, 784 S.W.2d 355, 357 (Tex. 1990). Article 1396-8.13 (7) of the Texas Statutes provides that, where corporations withdraw their formal registration, they can only do so subject to paying or providing for "all known creditors or claimants". In addition, Sect. 17.044(a) of Chapter 17 of the Texas Civil Practice and Remedies Code provides that "the secretary of state" of Texas shall be deemed the agent of a non-resident who "becomes a non-resident after a cause of action arises in this state but before the cause is matured by suit in a court of competent jurisdiction". The net effect of these provisions is, under Texas law, to render GTO subject to the in personam jurisdiction of the Texas courts for causes of action arising while it was formally registered to do business in Texas, thus creating a potential "debt", even though suit was not filed

until after GTO terminated its formal registration in Texas.[14]

Unfortunately, since the district court in this case refused to allow discovery, while there are strong indications that the accident in Saudi Arabia had some connection with the ARAMCO/GTO/CMC dealings in Texas, there is nothing in the record on the question of whether such accident did in fact have some connection with GTO's activities in Texas. But assuming, arguendo, that they did not, the question arises - an important question which we believe the Supreme Court has not directly addressed - whether it is constitutionally permissible for Texas to impose personal jurisdiction upon GTO under such circumstances. We believe that the Court in Perkins v. Benguet implied that such policy on the part of Texas is constitutional.

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[14] See Prejean v. Sonatrach, 652 F.2d 1260, 1270 (5th Cir. 1981), holding that under Texas law a foreign corporation is amenable to jurisdiction for the purposes of all law suits brought within the state whether or not the cause of action relates to activities within the state, and Keene Corp. v. Hannah, 800 F.Supp. 490, 494 (W.D. Tex. Austin Div. 1992), holding that Texas' requirements for terminating registration are constitutional.

But the decision is not clear and we cannot find any other decision where the Court has clarified its position on that issue. We respectfully suggest that the Court should grant certiorari in order to clarify this important area of the law.[15]

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[15] There are a number of authorities which support the view that the Court should, particularly in a removal/remand situation, permit a state to impose in personam jurisdiction over GTO solely on the basis of GTO's registration to do business in Texas at the time of the accident made the basis of this suit. Compare Dalton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990), holding that it is constitutional for Minnesota to appoint an agent for a registered corporation for any cause of action, whether or not it arises out of the company's activities within the state, and Ladd v. Brickley, 158 F.2d 212 (1st Cir. 1946), cert. denied, 67 S.Ct. 675 (where the court discussed this precise question but did not make a conclusive decision on it, although it did cite Hunter as indicating that the cause of action arising during the registration period must be connected with activities within the state, 158 F.2d at 217, 218). Then there is 28 U.S.C. § 1359, which is designed to prevent parties from taking actions which result in expanding federal jurisdiction, and the cases construing it. See Miller & Lux. v. East Side Canal & I. Co., 29 S.Ct. 111 (1903); Kramer v. Caribbean Mills, Inc., 89 S.Ct. 1487 (1969); Oakley v. Goodnow, 118 U.S. 43 (1986); Martinez v. U.S. Olympics Committee, 802 F.2d 1275 (10th Cir. 1986); Provident Savings Life Assur. Soc. v. Ford, 114 U.S. 635 (1885); Deveck v. Japan CBM Corp., 877 F.2d 790 (9th Cir. 1989); and Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469 (2nd Cir. 1976).

The last two cases are of substantial significance to this case. The court in Deveck held that actions between a parent and subsidiary after the cause of action arises, which would otherwise create diversity jurisdiction, generate a presumption that they were done collusively "to create diversity jurisdiction" and unless the party seeking diversity jurisdiction goes forward with evidence rebutting that presumption, and proves that "there is a legitimate business reason" for the actions ostensibly creating diversity, the court

4. **Fednav Ltd.'s Contact With Texas, Through Ships Sailing In and Out of Texas Ports, Creates The Possibility That State Court Could Find Personal Jurisdiction As To The Alien Defendant Fednav.**

The alien defendant Fednav filed an affidavit by M-E Chlumecky which stated that Fednav is involved "in the shipping business" and that "over the last several years, some ships under Time Charter or Voyage Charter to Fednav Ltd., have called at various Texas ports". See Chlumecky Affidavit, supra, at 2. While the affidavit contends that these voyages were not sufficient to render Fednav subject to the in personam jurisdiction of the Texas courts, defendants did not overcome their heavy burden to show that there would be no possibility that the Texas courts could have found in personam jurisdiction over Fednav. See discussion with regard to the applicable test in determining this issue in Szabo v. Smedvig Tankredri, 95 F.Supp. 519 (S.D. N.Y. 1951), and the cases there cited,

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will reject federal jurisdiction. 877 F.2d at 792, 793. And see Prudential Oil Corp. at 476.

and Allenque v. Gulf and So. American S.S. Co., 103 F.Supp. 34, 35 (S.D. N.Y., 1952).

5. **In View of The Record in This Case, The Panel Majority of the Court of Appeals Effectively Emasculated Both The No Possibility and The Prima Facie Rule and Imposed an Intolerable Burden Upon Removed Parties In Fraudulent Joinder Cases.**

There is another reason why it is important for the Court to grant certiorari in this case. Although the district court erroneously refused to allow discovery in the case, the discovery elicited with regard to the forum non conveniens issue in the California cases, when taken together with Mr. Runion's affidavit and the Texas case law, makes it abundantly clear not only that the defendants failed to meet their burden of showing that there is "no possibility" that the Texas courts could have asserted in personam jurisdiction over at least one of the seven alien defendants, but also that the plaintiffs established a prima facie case with regard to in personam jurisdiction over CMI, GTO, SATOL and Fednav.

We have outlined above how Maguire,

Watkins, McLean and Nazareth indisputably established that CMC personnel occupied all major supervisory positions, including those dealing with the day-to-day operations, including those involving the vessels used in the lighterage operation in Saudi Arabia. Their testimony also demonstrated how CMC dominated CMI, GTO and SATOL and the operation in Saudi Arabia, thus rendering such subsidiaries nothing more than business conduits for CMC. They also testified as to how the operations in Saudi Arabia were shut down after the accident and most of the GTO/SATOL assets transferred to CMC and they discuss how CMI, GTO and SATOL were inadequately capitalized. Mr. Runion's affidavit[16] fully corroborates the

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[16] Both the district court and the Panel Majority of the Court of Appeals seemed unobjectively obsessed with the Runion affidavit, see 780 F.Supp. at 1477, n. 11 and 990 F.2d at 1497, n. 9. However, an objective analysis of the affidavit reveals that, while it does contain some legal opinions concerning which Mr. Runion is probably not qualified, and a quote from Mr. Maguire's deposition that creates a questionable inference, Mr. Runion does swear that he is "personally familiar with the facts stated herein"; outlines extensive experience in the offshore drilling industry; discusses his total familiarity with the multi-national, Crowley Maritime Corporation, and its subsidiaries, its modus operandi and the factual aspects of how it dominates its subsidiaries and has a very centralized operation; he discusses how he testified in another case

involving CMC and its subsidiaries and how the court in that case held that the subsidiaries were the alter-ego of CMC or vice-versa; he notes how he reviewed the information in the other case, the depositions and affidavits in this case and summarized the relevant excerpts from all of such depositions and evidence; he described how he checked with the secretary of state and undertook other investigation and found that GTO had not only been formally registered in Texas at the time of the accident, but how it had an operating office in Texas during that time; he described the corporate structure of CMC and its subsidiaries and how CMC acquired, after the accident, the assets of GTO and SATOL and shut down the operations in Saudi Arabia; he discussed how "CMC/GTO employees controlled and dominated SATOL generally and on a day-to-day basis"; and he expressed opinions that CMC so dominated CMI, GTO and SATOL that they were the business tool of CMC. See A 161-91. The courts below ignored all of the foregoing relevant testimony and focused solely upon the alleged misquote by Mr. Runion. See 780 F.Supp. at 1480.

Obviously, it would have been much better if Mr. Runion had included the portion omitted but he used the omission sign (...), clearly indicating that a portion had been omitted and the entire affidavit, including the omitted portion, was in the record before the court. Certainly Mr. Runion was not trying to hide anything and, indeed, as the district court indicated, the omitted portion was "obvious and easily discoverable". 780 F.Supp at 1480. Moreover, it is patently obvious that the only relevant portion of the excerpt – and the crucial one at that (and because it was crucial it seemed to enrage the district court) – was that "GTO had an office in Houston", probably in 1977 (and Mr. Runion's investigation determined that they were in fact officially registered to do business, as well as having an office in Texas, at that time). The district court's overreaction is much like the rule against impeachment on collateral matters and certainly did not justify the complete striking of Mr. Runion's affidavit. The striking of his affidavit is in conflict with the rationale of such Circuit Court decisions as Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), cert. denied, 105 S.Ct. 545 (1984); Payton v. Abbott Labs, 780 F.2d 238 (3rd Cir. 1983) and earlier Fifth Circuit decisions such as Poteet v. Dow Chemical Co., 868 F.2d 1428 (5th Cir. 1989); Osbourn v. Anchor Laboratories, Inc., 825 F.2d 908, 915, 916 (5th Cir. 1987) and Christopherson v. Allied-Signal Corp., 939 F.2d 1106,

undisputed testimony about GTO, its formal registration and office in Texas at the time of the accident and how CMC, at the time of the accident, and to this day, remains registered in Texas, with an office to do business there.

For the courts below to hold in these circumstances that it is clearly "not possible" for a Texas court to find in personam jurisdiction over GTO, CMI and/or SATOL, is to put them in conflict with numerous authorities, both state and federal. See Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986), (discussing Texas' law on alter-ego where a parent operates a subsidiary "as a mere tool or business conduit" and how Texas law imposes responsibility upon the parent where there is a transfer of assets out of a subsidiary corporation after the occurrence of the instance made the basis of the suit);[17]

1110 (5th Cir. en banc 1991). We respectfully submit that the Court would do well to examine this conflict also.

[17] In a rather shocking display of misreading the law, the Panel Majority of the Court of Appeals claimed that Petitioners' counsel had relied upon "Castleberry, 721 S.W.2d at 270, despite the fact that this case had been legislatively overruled four years earlier." See

Torregrossa v. Szelc, 603 S.W.2d 803 (Tex. 1980) (holding that inadequate capitalization is grounds in itself for applying the alter-ego doctrine); Gentry v. Credit Plan of Houston, 528 F.2d 571 (Tex. 1985); Product Promotions Inc. v Cousteau, 495 F.2d 483, 493 (5th Cir. 1974); Walker v. Walker, 583 F.2d 163 (5th Cir. 1978); Taca International Airlines v. Rolls Royce of England, 204 (N.E.2d N.Y. App. 1965); and 2 J. Moore and Lucas, Moore's Federal Practice, 41 4.25 [6] at 4-273 (2 Ed. 1982). (Reul, Product Promotions, Walker and Taca all hold that the presence of a parent or subsidiary for in

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990 F.2d at 1496, 1497 n. 8. As authority for that statement, the Panel Majority cited Farr v. Sun World Sav. Assn., 810 F.2d 294 (Tex. App.—El Paso 1991). It is obvious that the Panel Majority did not read this case because if it had it would have read the following: "As can readily be seen, the amendments to Article 2.21A effectively eliminated constructive fraud and the failure to observe corporate formalities and requirements. . .in connection with contract claims, but left untouched the effect of constructive fraud on tort." 810 S.W.2d at 296 (emphasis ours). Since this case is indisputably a tort case, the rules announced in Castleberry very much apply to this case. The Petitioners pointed this mistake out to the Panel Majority in their Motion for Rehearing, but, not only did the Panel Majority not grant the Motion, it did not correct the citation or the opinion. The failure to do so obviously will create precedential confusion with respect to future cases dealing with this issue.

personam jurisdictional purposes can constitute the presence of the other); Rittenhouse v. Mabry, 832 F.2d 380 (5th Cir. 1987) (the contacts of a physician, who was present in the forum, were attributed to a nonresident professional corporation for in personam jurisdiction purposes); Hitt v. Nissan Motor Company, Ltd., 399 F.Supp. 838, 846-47 (S.D. Fla. 1975) ("The contacts of Nissan-USA on behalf of Nissan-Japan . . . and the presence of franchise dealers are sufficient for in personam jurisdiction."); Hargrove v. Fibreboard, 710 F.2d 1154, 1159 (5th Cir. 1983) ("it has long been recognized . . . that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent 'does business' in a jurisdiction through the local activities of its subsidiaries"); Reul v. Sahara Hotel, 372 F. Supp. 995, 997 (S.D. Tex. 1974) (activities of New York corporation in Texas could be imputed to California corporation and California corporation could be said to be "doing business" in Texas for purposes of in personam jurisdiction); Thompson

v. Chrysler Motors Corp., 755 F.2d 1162, 1165-66 (5th Cir. 1985); Dudley v. Smith, 504 F.2d 979 (5th Cir. 1975) (applying alter-ego with less control than in present case); Maritime Transport Overseas, Inc v. Saudi Research and Development Corp., 507 F.Supp. 701 (S.D. Tex., Hou. Div. 1981); Bamford v. Hobbs, 569 F.Supp. 160 (S.D. Tex. Hou. Div. 1983); Energy Reserves Group Inc. v. Superior Oil Co., 460 F.Supp. 483, 502 (D. Kan. 1978); and Wells Fargo & Co. v. Wells Fargo Corp. Co., 556 F.2d 406 (9th Cir. 1977).[18]

With all due respect, the manner in which

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[18] In the Wells Fargo case, the court stated:

> While Nevada courts do not appear to have attempted to define the statutory terms agent and instrumentality, several other courts have recognized the existence of such a relationship as a basis on which, consistent with due process and the long-arm statutes before them, the principal may be served for the in-state actions of the agent.

556 F.2d at 419. See also, Beecham v. Pippin, 868 S.W.2d 356 (Tex. App.—Austin 1985, no writ); Cabalcetta v. Standard Fruit, 883 F.2d 1553 (11th Cir. 1989); I.A.M. National Pension Fund Benefit Plan v. Wakefield Industrial Inc., 699 F.2d 1254 (D.C. App. 983); Cavic v. Ground Ball Bahama Dev. Co., 701 F.2d 879 (11th Cir. 1983); Marsh v. Kitchen, 480 F.2d 1270 (2d Cir. 1973); U.S. v. Montreal Trust Co., 358 F.2d 239 (2nd Cir. 1966); Quarles v. Fuquels Industries, Inc., 504 F.2d 1358 (10th Cir. 1974); and Harris v. Derre and Co., 223 F.2d 161 (4th Cir. 1955).

the courts below blatantly disregarded the undisputed evidence in the record concerning domination and control by CMC, the impact under Texas law of the post-accident transfer of assets, the inadequate capitalization of the subsidiaries, the registered presence of GTO at the time of the accident and the use of Texas ports by Fednav, and all of the other circumstances revealed by the evidence in the record, constitutes an effective emasculation of both the "no possibility" and the "prima facie" rule. If the decision in this case is allowed to stand, an ominous uncertainty will have been introduced into the law pertaining to fraudulent joinder cases and the question of personal jurisdiction through related entities, agents or parent/subsidiary corporations.

C. Certiorari Should Be Granted To Decide The Question Whether A Federal Court In A Removal Case, Once It Determines That It Is Going to Decline Jurisdiction On Forum Non Conveniens Grounds, Should Remand To State Court Rather Than Dismissing.

This Court has never decided the above stated issue. There is a general line of

authorities holding that, in situations where a removal court decides it is going to decline jurisdiction on ground of forum non conveniens, it should remand rather than dismiss.

In 76 C.J.S., Removal of Cases § 266, the rule is well-stated:

> A cause previously removed from a state court to a federal court should not be dismissed by such court because its jurisdiction is lacking or has ceased to exist; nor should it be dismissed under the doctrine of forum non conveniens, but it should be remanded to the state court."

76 C.J.S. at 1124 (emphasis ours). See also, Murray v. Union Pac. Ry. Co., 77 F.Supp. 613, 614 (D.C. Ill. 1948); Buroes v. Proctor & Gamble Defense Corp., 172 F.2d 541 (5th Cir. 1949); and Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

Professor Moore explains why the rule applied in Murray and the cases cited above is the only just way to handle a case removed from state court when the federal court elects not to accept jurisdiction on the basis of the doctrine of forum non conveniens:

If the federal court to which the action

> is removed is not prepared to go forward with the case and there is no convenient federal venue to which the suit can be transferred, then, to our mind, simple justice requires a remand to the state court so that it can go forward with the case or dismiss it, as it sees fit. The doctrine of forum non conveniens is a procedural, not a jurisdictional doctrine; and the federal court should not impose its procedural doctrine upon a plaintiff who did not invoke its jurisdiction, for the purpose of preventing an adjudication in both federal and state forums. The purpose of removal jurisdiction is to give a defendant, in certain cases, a right to trial in a federal forum, not a means of escaping trial in both state and federal forums.

1A Moore's Federal Practice, Removal Procedure, § 0.169 [1], pp. 684-5; emphasis ours.[19]

We submit that the Court should grant certiorari and resolve the conflict on this important issue in the manner suggested by Professor Moore.

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[19] While, as we noted above, this Court has never addressed the issue, it has decided, in a somewhat analogous situation, that a federal court can remand rather than dismiss, where it declines discretionary jurisdiction. See Carnegie-Mellon v. Cohill, 108 S.Ct. 614, 621, 622 (1988) (involving pendent jurisdiction situations). In addition to the rulings of the lower courts in this case, there are other decisions which are in conflict with the authorities we have cited and hold that a federal court can dismiss a removed case rather than remanding, even though it has decided to decline jurisdiction on ground of forum non conveniens. See, e.g., Nolan v. Boeing, 919 F.2d at 1070.

D. The Court Should Grant Certiorari To At Long Last Resolve the Issue Of Whether Federal or State Forum Non Conveniens Law Applies In a Diversity Case In Federal Court, When The Resolution Of That Issue Makes a Difference In The Outcome.

This Court has long pretermitted the resolution of the above stated issue. See Gulf Oil v. Gilbert, 67 S.Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 102 S.Ct. 252, 262 (1981). The reason the Court deferred the issue in Gilbert and Reyno is that there was no difference between federal and state forum non conveniens law in those cases. As we have explained above, there is the difference of life and death between federal and Texas state forum non conveniens law. See Dow Chemical Co. v. Alfaro, supra, 786 S.W.2d at 678[20].

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[20] The Texas legislature has recently amended Texas law to modify Sect. 71.031 of the Tex. Civ. Prac. & Rem. Code (commonly referred as the open forum statute). See Sect. 71.051 of Tex. Civ. Pract. & Rem. Code. However, all cases filed, such as this one, before September 1, 1993 are to be decided under the open forum statute. Therefore, there is a vast difference between federal and Texas forum non conveniens law that is applicable to this case. If the defendants argue that the change in Texas forum non conveniens law, though the change does not apply to this case, reduces the significance of this issue, we make two points: first, the new statute is, as can be seen from a reading of the statute, far more generous to the plaintiffs than current federal forum non conveniens law; and, second, there are still a

In Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945), the Second Circuit, in an opinion by the distinguished Judge Learned Hand, held that a federal court sitting in diversity, after removal from state court, must, in determining the forum non conveniens issue, apply state forum non conveniens law if the outcome would have been different had the court applied federal forum non conveniens law. 149 F.2d at 195. See also, Medow Industries, Inc. v. Kirsch Company, Inc., 356 F.Supp. 52, 55 (S.D. N.Y. 1973).

In two other circuits the courts have held that a federal court sitting in diversity should apply federal forum non conveniens law. Sibaja v. Dow Chem Co., 757 F.2d 1215 (11th Cir. 1985) and In re Air Crash Near New Orleans, La., 821 F.2d 1147, 1154-59 (5th Cir. 1987) (en banc). However, neither of those cases involved causes that had been removed from state court, whereas

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substantial number of states where state forum non conveniens law is more favorable to plaintiffs than federal forum non conveniens law. These states include Florida, Louisiana, Missouri, Connecticut, Kansas and South Carolina, among others. Therefore, the issue continues to have a significant impact upon the field of forum non conveniens law.

Weiss v. Routh was a removed case.[21]

In Guaranty Trust Co. v. N.Y., 65 S. Ct. 1464 (1945), this Court held that, "putting to one side abstractions regarding 'substance' and 'procedure'", it would apply the Erie doctrine "with an eye alert to essentials in avoiding disregard of state law in diversity cases in the federal courts" and would apply state law, even if labeled "procedural", if the failure to do so would result in a different "outcome" in the federal court. Id. at 1469-70.

We urge the Court to grant certiorari on this issue in order to resolve the conflicts among the circuit courts, and with the rationale of the "outcome determinative" doctrine adopted

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[21] The reason the "removal" ingredient provides, we submit, a more compelling case for application of state forum non conveniens law, as was held in Weiss v. Routh, is that the forum non conveniens doctrine centers upon "choice of forum" by the plaintiffs. See Gulf Oil v. Gilbert, 67 S.Ct. at 843. In this case, as in Weiss, the plaintiffs chose the state forum, not the federal forum. That choice of forum, and the outcome plaintiffs would obtain in the chosen forum, must be honored. That is the essence of the Erie doctrine as Judge Hand recognized in Weiss v. Routh, 149 F.2d at 195. See Pennzoil v. Texaco, 107 S. Ct. 1519 (1987) and Chick Kam Choo v. Exxon, 108 S. Ct. 1684, 1691 (1988), holding that the Texas courts are fully capable of resolving relevant issues.

by this Court in order to preserve the integrity of the Erie doctrine.

E. As To The Forum Non Conveniens Question, Petitioners Suggest It Is Time For the Court To Reexamine That Issue.

The Court has not fully examined the forum non conveniens issue since its decision in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252 (1981). A lot has happened since then and the world has accelerated its meteoric march to change. One great change has been the introduction of the facsimile process. Another has been the trend toward telephone depositions and even depositions by transcontinental video hookup. Moreover, all forms of transcontinental travel have become more streamlined and accessible. The world is much different from that which existed in 1981 and even more different from that which existed in 1947, when this Court decided Gulf Oil v. Gilbert.

Moreover, while the Court in Piper sanctioned the use of stipulations by defendants in order to make the grant of the motion more feasible, and as a matter of simple justice the

lower federal courts should also accept and give effect to stipulations tendered by the plaintiffs, the courts below have ignored them in this case.[22] We cannot emphasize enough the importance of these stipulations. They drastically shift the impact of convenience/inconvenience on the litigation. Furthermore, this case fortifies the proposition that only in the United States - particularly considering the inability to take depositions of foreign witnesses if the litigation were pending

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[22] These stipulations are: to present plaintiffs in the United States for deposition and trial and for examination by experts of defendants' choice; to use American experts with regard to both liability and damages, such experts being easily available for deposition and trial in the United States; and to pay the cost of transportation of counsel for the defendants to go to Saudi Arabia or the Philippines, the two proposed alternative fora in this case, to take the depositions of any relevant witnesses located there, should the defendants want to take their depositions (if any witnesses can be found there, which the record makes extremely doubtful). Indeed, the willingness to pay travel expenses of defendants' counsel, though generally ignored by recent decisions, has been given effect by some courts. See Irish National Insurance Co. v. Aer Linquis, 739 F.2d 90, 92 (2nd Cir. 1984) (holding that the fact that the plaintiffs had stipulated they would pay the costs of counsel to go to Ireland to take depositions there was a controlling factor in denying the forum non conveniens motion); and Costa v. Textron, No. CA-4-81-233 (N.D. Tex. 1984) (forum non conveniens motion denied because plaintiffs paid defendants' counsel's expenses to go to Brazil to take depositions there).

in Saudi Arabia or the Philippines - can this truly international case be fully, fairly and justly tried.

And this brings us to the development of statistics and information concerning how the forum non conveniens doctrine has fared since 1981. This is fully discussed by Justice Doggett in his concurring opinion in Dow Chemical Co. v. Alfaro, 786 S.W.2d at 682, 683. There he discusses the realities of how the doctrine has become outcome determinative – that dismissals to foreign fora terminate the litigation in most of the cases.

Moreover, it is patently clear that the lower federal courts have become far too aggressive in applying the doctrine. See, e.g. cases where the courts have threatened mandamus or reversed and rendered where the district court has exercised its discretion to retain jurisdiction. Munasamy v. McClelland Engineering, 579 F.Supp. 149 (E.D. Tex. 1984), mandamus threatened in Re McClelland Engineers, Inc. 742 F.2d 837 (5th Cir. 1984) and forum non

conveniens denials reversed and rendered in McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313 (5th Cir. 1986) and De Oliveiro v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir. 1983).

Some courts – certainly not the courts below – have become realistic about whether a foreign forum is truly an adequate alternative forum. For example, in Mercier v. Sheraton Intern., Inc., 935 F.2d 419, 425 (1st Cir. 1991), the court held that, as a matter of law, the defendants failed to meet their burden of establishing that Turkey was an adequate alternative forum.[23] Similarly, the real truth is that neither Saudi Arabia nor the Philippines are adequate alternative fora in this case.

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[23] See also, Watson v. Merrell Dow Pharmeceuticals, Inc., 769 F.2d 354 (6th Cir. 1985); Lacey v. Cessna Aircraft Company, 932 F.2d 170 (3rd Cir. 1991); Nieminen v. Breeze Eastern, a Division of Transtechnology Corporation, 736 F.Supp. 580 (D.C.N.Y. 1990); Crimson Semiconductor, Inc. v. Electronum, 629 F.Supp. 903 (S.D.N.Y. 1986); McKrell v. Penta Hotels (France) S.A., 703 F.Supp. 13 (S.D.N.Y. 1989); Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F.Supp. 688 (S. D.N.Y. 1986); Recumar Inc. v. KLM Royal Dutch Airlines, 608 F.Supp. 795 (D.C.N.Y. 1985); Hatzlachh Supply Inc. v. Tradewind Airways Limited, 659 F.Supp. 112 (S.D.N.Y. 1987).

In addition, the duty of nations to regulate and monitor the conduct of multi-nationals who base their operations there, is one that pervades the ethical aspects of international law. As the multi-nationals have made rapid gains in international dominance in the last ten years the need for the enforcement of this duty has correspondingly increased. Yet the courts below, and most federal lower courts in recent decisions, implicitly take the position that no such duty exists.

In the final analysis, this case is an excellent one demonstrating the urgent need for this Court to grant certiorari in order to fully reexamine the forum non conveniens doctrine. To begin with, although the defendants offered no evidence on the issue of location of witnesses and other relevant circumstance, as they existed at the time of the district court's determination, the courts below did not seem to mind; they decided the issue as if no evidence

were necessary.[24] It is undisputed that there are no witnesses in Saudi Arabia. There are no witnesses in the Philippines except the plaintiffs (who will be brought to the United States at their own expense). The surviving crew members, based upon last report, are probably in the Gulf of Mexico, not far from the Texas jurisdiction. The captain is either in the Gulf of Mexico or in Vietnam. Based on the deposition testimony before the court, the supervisory witnesses whose location could be identified are all in the United States. Yet, the district court, in making its analysis, unfairly gave effect to defendants stipulations and ignored the

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[24] This violates even Fifth Circuit law. See In Re Aircrash New Orleans, 821 F.2d 1147 (5th Cir. 1987) (en banc). The en banc court held that the circumstances at the time of filing the current motion control the forum non conveniens determination. 821 F.2d at 1156. It also held that the court must have sufficient evidence before it so that it can make a thorough analysis of the forum non conveniens factors and "explain its decision-making process clearly and in sufficient detail to permit us (the appellate court) adequately to review it, either by giving written reasons or by dictating the reasons for its decision into the record with the same degree of explicitness." 821 F.2d at 1166-67. The fact that defendants, the proponents of the forum non conveniens motion, failed to offer any evidence on the motion or to make any attempt to satisfy their burden, in itself should have evoked remand by the Court of Appeals.

plaintiffs; stated that it "carefully" examined the record but never mentioned any of the deposition testimony about the location of witnesses of Maguire, Watkins, McLean and Nazareth; and then made the astounding statement that "there is no evidence to indicate that the cost of obtaining witnesses would be any more difficult in the Philippines than in Texas" (cost for what witnesses?) None of the liability witnesses will be obtainable in the Philippines and therefore plaintiffs would never be able to prove their case there. See 780 F.Supp. 1484, 1485.

Again, this case is a classic example of why this Court should grant certiorari and revisit the forum non conveniens doctrine. We respectfully suggest that, while there is, in more narrow circumstances, perhaps a justification for the doctrine, an unfortunate pattern has evolved in the federal courts for using the doctrine to reduce dockets rather than to obtain justice and in doing so, the consequence has been a regretful xenophobic

discrimination against foreign plaintiffs. We hope the Court will, in view of modern travel and technology, and the importance of the other considerations discussed above, authorize the use of the doctrine only where defendants clearly prove that there are a number of witnesses crucial to their case whose testimony cannot be secured in the United States court under reasonable circumstances but can, with certainty, be secured in the alternative forum. This will, we concede, drastically reduce the number of instances where the motion would be granted. But, at least the plaintiffs would have a chance to secure substantial justice, through a trial on the merits, whereas now, when the motion is granted, in reality the right of most plaintiffs come to an end.[25]

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[25] The courts below also granted an injunction. Because this injunction extends to potential state court litigation, we believe it violates this Courts holding in Chick Kam Choo v. Exxon, 108 S.Ct. 1684 (1988). We suggest that, should the court grant certiorari, it would be propitious to clarify the scope of the Chick Kam Choo decision and whether it in fact does preclude such an injunction.

F. The Granting of Sanctions In This Case Should Be Examined By The Court Because of Its Potential For Chilling Innovative Advocacy

An objective examination of the grounds expressed by the district court and the Panel Majority of the Court of Appeals reveals that the courts below imposed sanctions upon Gary Riebschlager, plaintiffs counsel in the district court, in the punitive sum of $51,747.53, simply because he had the audacity to argue for a clarification of, or change in, existing law. What made his actions as a matter of law reasonable and permissible is that every position he took involved an issue that was not clear under Fifth Circuit law, or if the Fifth Circuit had made a holding expressly contrary to plaintiffs' position, there were conflicting holdings by other courts and this Court has not yet resolved those conflicts. Therefore, it was clearly error and an abuse of discretion for the courts below to grant sanctions in this case. See Cooter & Gel v. Harmarks, 110 S.Ct. 2447, 2457-58 (1990); Mareno v. Rowe, 910 F.2d 1043

(2nd Cir. 1990); Davis v. Carl, 906 F.2d 533 (11th Cir. 1990); Westlake North Property Owners v. Thousand Oaks, 915 F.2d 1301, 1307 (9th Cir. 1990); Teamsters Local Union No. 430 v. Cement Express Inc., 841 F.2d 66 (3rd Cir. 1988); U.S. Industries Inc. v. Touche Ross Co., 854 F.2d 1223 (10th Cir., 1988); and Schaefer v. Transportation Media Inc., 859 F.2d 1251 (7th Cir. 1988). The Panel Majority, in its zeal to punish plaintiffs' counsel, even contradicted earlier Fifth Circuit decisions, see, e.g., Smith v. Our Lady of the Lake Hospital Inc., 960 F.2d 439 (5th Cir. 1992).

The Court, we suggest, should grant certiorari in order to ensure that decisions such as the one in this case, which have the definite effect of chilling innovative litigation and zealous advocacy are not allowed to stand and, further, in order to resolve the conflict between the decision of the Panel Majority in this case and the other cases cited above.

WHEREFORE, Petitioners pray the Court to grant a writ of certiorari for all the reasons stated in this Petition.

Respectfully submitted,

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93-702

Supreme Court, U.S.
FILED
SEP 28 1993

NO. (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NENITA S. VILLAR,
et al,

Petitioners

v.

CROWLEY MARITIME
CORPORATION, et al,

Respondents

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONERS

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APPENDIX A

Nenita S. VILLAR, Individually and as Personal Representative of Renerio Z. Villar, Deceased; Josephine Villar; Gerardo Villar; Reynaldo Villar, and Renerio Villar Jr., Plaintiffs,

v.

CROWLEY MARITIME CORPORATION; Crowley Maritime International, S.A.; Crowley Maritime International, S.A., d/b/a GTO Corporation, k/n/a WTO Corporation; Genstar Ltd., k/n/a Genstar Corporation; Fednav Ltd., successor in interest to Federal Commerce & Navigation; Ross Insurance Ltd., successor in interest to Genstar Overseas Ltd.; Ross Insurance Ltd., successor in interest to Genstar Overseas Ltd., d/b/a GTO Corporation, k/n/a WTO Corporation; Federal Pacific Ltd.; Federal Pacific Ltd., d/b/a GTO Corporation, k/n/a WTO Corporation; Saudia

Arabian Transport Organization Ltd., Defendants

Civ. A.No. H-91-0743.

United States District Court,

S.D. Texas,

Houston Division.

Jan. 7, 1992.

Gary M. Riebschlager, O'Quinn, Kerensky & McAninch, Houston, Tex., for plaintiffs.

Jack L. Allbritton, Fulbright & Jaworski, Houston, Tex., for defendants.

ORDER

KENT, District Judge.

This matter is before the Court on the basis of three Motions: 1) the Joint Motion, brought by all Defendants save Crowley Maritime Corporation, to Dismiss for Want of Personal Jurisdiction; 2) the Motion of Crowley Maritime Corporation to

Dismiss for Res Judicata and Forum Non Conveniens; and 3) Plaintiffs' Motion to Remand.

PARTIES

This action arises out of the death of Renerio Z. Villar ("Villar"), a citizen of the Philippines. Mr. Villar drowned on or about March 5, 1977 while in the course of his employment as a crew member of the vessel Bannock. Plaintiffs allege that Defendants' negligence was the legal and proximate cause of Villar's death.

Plaintiff Nenita S. Villar is Villar's widow and personal representative. Plaintiffs Josephine Villar, Gerardo Villar, Reynaldo Villar and Renerio Villar Jr. are Villar's children. All Plaintiffs[1] are citizens of the Philippines.

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[1] Hereinafter referred to collectively as "Plaintiffs."

Plaintiffs commenced this action against Crowley Maritime Corporation; Crowley Maritime International, S.A.; Crowley Maritime International, S.A. d/b/a GTO Corporation; Genstar Ltd.; Federal Commerce & Navigation; Genstar Overseas Ltd.; Genstar Overseas Ltd., d/b/a GTO Corporation; Federal Pacific Ltd.; Federal Pacific Ltd., d/b/a GTO Corporation; and Saudia Arabian Transport Organization Ltd.

Crowley Maritime Corporation ("CMC") is a Delaware Corporation with principal place of business in California.

Defendants assert by affidavit, and Plaintiffs do not contest, that:

1) Crowley Maritime International, S.A. ("CMI") is an inactive Panamanian corporation, and is also a wholly owned subsidiary of CMC.

2) As of the date of Villar's death, Genstar Ltd. was a Canadian Corporation. Subsequently, it became Genstar Corporation. In March, 1986, Genstar Corporation was acquired by Imasco

Enterprises, Inc. following a public tender offer. Genstar Corporation has been in voluntary dissolution and wind up since December, 1986.

3) As of the date of Villar's death, Genstar Overseas Ltd. ("Genstar Overseas") was a Bermuda Corporation and was wholly owned by Genstar International, S.A., a Luxembourg corporation. Genstar International, S.A., was subsequently wound up and merged with Ross Insurance Ltd. ("Ross"), a Bermuda Corporation. Ross is the successor in interest to Genstar Overseas.

4) Federal Pacific Ltd. ("Federal Pacific") is a Bermuda Corporation.

5) As of the date of Villar's death, GTO Corporation ("GTO") was a Liberian corporation. GTO's stock was owned in equal percentages by CMC, Genstar Overseas, and Federal Pacific. In 1979 CMC acquired all of the stock in GTO and changed its name to WTO Corporation ("WTO").

6) As of the date of Villar's death, GTO owned 60% of the stock of Saudi Arabian Transport Organization, Ltd. ("SATOL"), a Saudi Arabian corporation. The other 40% was owned by Yusuf Bin Ahmed Kanoo ("Canoo"), a Saudia Arabian Corporation.

Finally, some confusion exists regarding the status of Federal Commerce & Navigation Ltd. and its relationship to Federal Pacific Ltd. Plaintiffs allege that federal Pacific Ltd. was at all times a wholly owned subsidiary of Federal Commerce and Navigation Ltd. Defendants, however, assert through affidavit that, as of the date of Villar's death, Federal Commerce & Navigation Ltd. was a Canadian Corporation. Subsequently it was merged with Fednav Ltd., a Canadian Corporation. Fednav Corporation is now doing business as Federal Commerce & Navigation, a Division of Fednav Ltd. Federal Pacific Ltd. was, at all times, a wholly owned subsidiary of Fednav Ltd., not Federal Commerce & Navigation. In other words, Federal Pacific had no relationship of any kind with Federal Commerce & Navigation Ltd. until the latter was acquired by

Fednav Ltd. This confusion, however, does not affect the outcome of the Court's decision.

CMC is doing business in Texas and maintains an agent for service of process. None of the other Defendants[2] maintains an agent for service of process in Texas.

PROCEDURAL HISTORY

At the time of his death, Villar was employed by SATOL under an employment contract executed in the Philippines. Under this contract, in the event that Villar was injured in the course of his employment, he could choose to receive compensation under either Philippine worker's compensation law or the law of the country of registry of the vessel he was assigned to. On the date of his death, Villar was working in Saudi Arabia

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[2] Hereinafter referred to collectively as "Codefendants."

as a crew member of the vessel Bannock, which was conducting a lighterage operation. The Bannock was registered under and flying the flag of Panama, and was in the service of SATOL. Villar drowned while attempting to secure Barge 204, which had broken loose from its mooring. See Villar v. Crowley Maritime Corp., 782 F.2d 1478, 1479 (9th Cir.1986); Villar v. Crowley Maritime Corp., No. A046664, 1,2 (Cal.Ct.Ap. Dec. 17, 1990).[3]

The Plaintiffs filed suit against CMC, GTO, SATOL, and several other corporations in the United States District Court for the Northern District of California. The court held that Philippine law was controlling and dismissed the action for forum non

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[3] The factual finding of the Ninth Circuit and the California Court of Appeals are res judicata for purposes of this action.

conveniens. The court, however, conditioned its dismissal on the Defendants' agreement to waive all jurisdiction, venue, and statute of limitations defenses as to any action brought by the Plaintiffs based on Villar's death and commenced in the Philippines within one year. The Ninth Circuit Court of Appeals affirmed.[4] Villar v. Crowley Maritime Corp., supra, 782 F.2d at 1479-83.

Plaintiffs, however, did not file suit in the Philippines. Instead, they filed an identical suit in California State Superior Court. That court dismissed based on the California Doctrine of forum non conveniens, and the

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[4] The Ninth Circuit affirmed the district court's decision that foreign law applied but did not determine whether the law of the Philippines, Saudi Arabia, or Panama was controlling. Villar v. Crowley Maritime Corp., supra, 782 F.2d at 1482.

California Court of Appeals affirmed. Villar v. Crowley Maritime Corp., supra, No. A0446664 at 2.

Plaintiffs subsequently commenced this action, the third arising out of Mr. Villar's death, in the State District Court of Harris County, Texas. CMC removed to this Court alleging jurisdiction under 28 U.S.C. § 1332(a)(2). The Codefendants joined in this removal subject to any other defenses they may possess. CMC now moves to dismiss for res judicata and forum non conveniens. The Codefendants jointly move to dismiss on the ground that they are not subject to personal jurisdiction. Plaintiffs move to remand to state court on the ground that complete diversity is lacking and therefore removal was improper.

DISCUSSION

I. ORDER OF CONSIDERATION

Plaintiffs argue that the Court must first address their Motion to Remand before considering Defendants' motions. Plaintiffs agree, however, that "the first order of business for the federal court is to determine its own jurisdiction." Jones Store Co. v. Hammons, 424 F.Supp. 494, 499 (W.D.Mo.1977) (quoting 1A Moore, Moore's Federal Practice, para. 0.169[1], at 557). To do this, however, the Court must consider at least the substance of the Codefendants' Motion to Dismiss.

Defendants removed to this Court pursuant to 28 U.S.C.A. § 1441(a) (West Supp.1991), on the ground that this Court could have exercised original diversity jurisdiction pursuant to 28 U.S.C.A. § 1332 (a)(2) (West 1991 Supp.). However, complete diversity is not present in a suit between an alien and an alien

corporation. Chick Kam Choo v. Exxon Corp.,764 F.2d 1148, 1153 (5th Cir.1985). It is undisputed that Plaintiffs are citizens of the Philippines and that Codefendants are alien corporations. Thus, at first blush, this Court appears to lack subject matter jurisdiction.

Plaintiffs argue that this ends the Court's inquiry; Chick Kam Choo requires remand. In Chick Kam Choo, however, the plaintiffs were citizens of Singapore and one of the defendants was a Liberian corporation with its principal place of business in New Jersey. The defendants successfully argued that diversity does not exist in a suit between aliens. In the instant case, however, the Defendants do not argue that jurisdiction is proper because complete diversity exists between Plaintiffs and all Defendants. Rather, they allege that complete diversity exists

between Plaintiffs and CMC, and only CMC is subject to personal jurisdiction in Texas. Therefore, removal was proper because the Codefendants were fraudulently joined in an attempt to defeat diversity, an issue not addressed in Chick Kam Choo.

In general, the fraudulent joinder of a nondiverse party will not defeat removal if the removing party can prove "that there is 'absolutely no possibility' that the nondiverse defendant will be liable to plaintiff in state court." Robinson v. National Cash Register Co., 808 F.2d 1119, 1123 (5th Cir.1987)(quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir.1983), cert. denied, 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166 (1984)). Normally, however, the removing party bears the burden of establishing federal jurisdiction. The court must evaluate all factual allegations and resolve all

uncertainties in controlling substantive law in the light most favorable to the nonremoving party. The court must remand the action unless the removing party has established that the nonremoving party could not recover in state court. Laughlin v. Prudential Ins. Co., 882 F.2d 187, 190 (5th Cir.1989).

In the typical fraudulent joinder case, a plaintiff attempts to destroy diversity, and thereby defeat removal, by bringing a state court action against both a resident and a nonresident defendant.[5] Since the nondiverse defendant is citizen of the forum state, there is no question that such defendant is subject to personal jurisdiction. Thus, to establish fraudulent joinder the removing party must

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[5] Removal is improper if complete diversity does not exist or if a defendant is a citizen of the forum. 28 U.S.C.A. §1441(a)-(b) (West 1973 &1991 Supp.)

demonstrate that the court lacks subject matter jurisdiction over the claim against the nondiverse defendant because the plaintiff could not possibly prevail, on the merits, in state court. This necessarily requires the court to pass judgment on the substantive merits of the plaintiff's claim before the facts and legal issues are fully developed at trial, a difficult and uncertain task at best. See, e.g., Nolan v. Boeing Co., 736 F.Supp. 120, 121-22 (E.D.La.1990).

The instant case, however, presents a different question. The Codefendants' fraudulent joinder allegations are unrelated to Plaintiffs' substantive claims. Instead, Codefendants argue that Plaintiffs cannot prevail in state court because they cannot establish personal jurisdiction over Codefendants. Thus, even if the Court first considers

Plaintiffs' Motion to Remand, it must necessarily consider the substance of Codefendants' Motion to Dismiss, if not the actual motion itself.

In general, if a nonresident defendant contests the exercise of personal jurisdiction, the plaintiff is required to make a prima facie showing that personal jurisdiction exists. Rittenhouse v. Mabry, 832 F.2d 1380, 1382 (5th Cir.1987). Plaintiffs, however, argue that the Court should consider their Motion to Remand first, and, in so doing, should evaluate the Codefendants fraudulent joinder claims under a traditional fraudulent joinder analysis. In other words, the Court should remand the action unless the Codefendants can prove that there is no possibility that the Plaintiffs can establish personal jurisdiction over the Codefendants in

Texas.

Recently, two district courts in this circuit have addressed this identical issue. In both Nolan v. Boeing Co.[6] and Martino v. Viacao Aerea Riograndense, S.A.,[7] an alien plaintiff or plaintiffs brought suit in Louisiana state court against a nonresident United States corporation, admittedly doing business in Louisiana, and an alien corporation. The United States corporation removed to federal district court, alleging fraudulent joinder based on lack of personal jurisdiction.

In both Nolan and Martino, the Court relying on existing Fifth Circuit case

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[6] 736 F.Supp. 120 (E.D.La.1990).

[7] Civil Action No. 90-1883, 1991 WL 13886 (E.D.La.1991).

law,[8] held that when presented with both a motion to remand and a motion to dismiss for lack of personal jurisdiction, the district court has the discretion to decide which to take up first. Nolan v. Boeing Co., supra, 736 F.Supp. at 122-23 (citing Walker v. Savell, supra); Martino v. Viacao Aerea Riograndense, S.A, supra, 1991 WL 13886, at *2(citing Schwegmann

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[8] In Walker v. Savell, 335 F.2d 536, 538 (5th Cir.1964), the Fifth Circuit held that when presented with both a motion to dismiss for lack of personal jurisdiction and amotion to remand, the trial court may decide either motion first. In Allen v. Ferguson, 791 F.2d 611, 615 (7th Cir. 1986), the Seventh Circuit limited Walker to those cases in which personal jurisdiction can never be obtained, as opposed to those cases where the lack of personal jurisdiction can be cured. such as where process is defective and the like. In the instant case, however, the Codefendants allege that personal jurisdiction can never be obtained over them in Texas. Thus, even under the more restrained Allen approach, it is appropriate for the Court to consider the Motion to Dismiss first. See also Nolan v. Boeing Co.,736 F.Supp. 120, 123 (E.D.La.1990).

Bros. Giant Super Mkts, Inc. v. Pharmacy Reports, Inc. 486 F.Supp. 606 (E.D.La.1980) (citing Walker v. Savell, supra). Both courts then addressed the motion to dismiss first, granted it, and then denied the motion to remand. Nolan, 736 F.Supp. at 127 Martino, 1991 WL at *2.

This Court agrees with the decision in Nolan and Martino. First, as noted above, the Court must necessarily address the personal jurisdiction question regardless of which motion is addressed first. Thus, judicial economy favors deciding the Motion to Dismiss at the outset.

Moreover, this Court is quite capable of determining whether the Codefendants are subject to personal jurisdiction in Texas. If they are, then the Court can simply grant Plaintiffs' Motion to Remand and the litigation can proceed in state

court. On the other hand,if the Court grants Plaintiffs' Motion to Remand, without deciding the Motion to Dismiss, and the Defendants prevail on their motion in state court, CMC, the remaining diverse Defendant, will, under applicable Fifth Circuit law, be unable to remove to this Court. See Weems v. Louis Dreyfus Corp., 380 F.2d 545, 545-49 (5th Cir.1967); Nolan v. Boeing Co., supra, 736 F.Supp. at 123 n. 2. In other words, if the Court adopts Plaintiffs' view as to the order in which the motions should be decided, then, even if the Codefendants' joinder was wholly improper, the Plaintiffs may well succeed in keeping this action in state court unless the Court first considers the Motion to Dismiss.

II. PERSONAL JURISDICTION

A court may exercise personal jurisdiction over a foreign defendant to

the extent permitted by the long arm statute of the state in which it sits and the Due Process Clause of the Fourteenth Amendment. Rittenhouse v. Mabry, supra, 832 F.2d at 2383. The Texas long arm statute authorizes the exercise of jurisdiction over nonresident defendants who are "doing business" in Texas. Tex.Civ.Prac. & Rem Code Ann. § 17.042 (Vernon 1986). The "doing business" section of the statute extends as far as the United States Constitution permits.[9]

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[9] In Hargrave v. Fibreboard Corp., the Fifth Circuit held that the statute's scope is limited in certain contexts, including those cases in which a plaintiff attempts to assert personal jurisdiction over a foreign defendant based on the fact that a subsidiary is doing business in Texas. If the foreign defendant is beyond the literal reach of the statute, the court held, then the constitutional issues need not be addressed. 710 F.2d 1154, 1161 n.4 (5th Cir.1983). See also Product Promotions, Inc. v. Cousteau 495 F.2d 483, 491-92 (5th Cir.1974). While the Hargrave Court analyzed the issue under Texas law, more recent cases, however, have assumed

Schlobohm v. Schapiro, 784 S.W.2d 355, 356-57 (1990); U-Anchor Advertising, Inc. v.Burt, 553 S.W.2d 760, 762 (Tex.1977), cert. denied, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978). See also Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491-92 (5th Cir.1974). Thus, in the instant case, the two questions are merged. The sole issue is whether this Court can constitutionally exercise personal jurisdiction over the Codefendants.

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that the Texas Statute extends to the limit of due process and have then applied the Hargrave analysis as part of the federal due process inquiry. See Southmark Corp. v. Life Investors, Inc., 851 F.3d 763, 772 n.15 (5th Cir. 1988). Similarly, in Schlobahm v. Schapiro, 784 S.W.2d 355, 356-57 (Tex.1990), the Texas Supreme Court reaffirmed its holding in U-Anchor Advertising Inc. v. Burt, 553 S.W.2d 760, 762 (Tex.1977), that the long-armed statute extends as long as due process allows. Therefore, for purposes of this decision, the Court will assume that the statutory inquiry and the due process inquiry are identical.

The Due Process Clause limits a court's power to exercise personal jurisdiction over a nonresident defendant. First, the defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)(quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278 (1940)). If such contacts exist, a Court may exercise personal jurisdiction provided that it would not be unfair to require the defendant to litigate in the forum state. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 107 S.Ct. 1926, 94 L.Ed.2d 92 (1987); Dalton v. R & W Marine, Inc.,897 F.2d 1359, 1361 (5th Cir.1990).

A. Minimum Contacts.

The minimum contacts analysis varies depending on the nature of the underlying claim. Two types of personal jurisdiction exist, specific and general. Specific jurisdiction is proper when the defendant has "purposefully directed" his activities toward forum residents and the injury complained of arises out of such activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). General jurisdiction is personal jurisdiction based on the defendant's "continuous and systematic" general business contacts. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 & n. 9, 104 S.Ct. 1868, 1872 n. 9, 80 L.Ed.2d 404 (1984). In the latter situation, however, the forum state has no direct interest in the underlying dispute. Therefore, due

process requires minimum contacts "of a more extensive nature and quality" than those required to establish specific jurisdiction. Dalton v. R & W Marine, Inc., supra, 897 F.2d at 1362. In the instant case, the only question properly raised is whether this Court can exercise general personal jurisdiction over the Codefendants.

1. "Alter Ego" Doctrine

With one exception, discussed in more detail infra, Plaintiffs do not claim that the Codefendants are subject to general personal jurisdiction based on their own contacts with the State of Texas. Rather, Plaintiffs argue that, as subsidiaries of CMC, the Codefendants are the "alter egos" of CMC. Since CMC is admittedly doing business in Texas, both CMC and the Codefendants are necessarily subject to personal jurisdiction.

At the outset, Plaintiffs' arguments raise two troubling points. First, in the typical "alter ego" case, the plaintiff files suit against a subsidiary corporation in a forum in which the subsidiary is subject to personal jurisdiction. The plaintiff then attempts to assert personal jurisdiction over the parent corporation, which would otherwise not be subject to personal jurisdiction in that forum, on the grounds that the subsidiary is the "alter ego" of the parent. The instant case, however, is one step removed. Basically, Plaintiffs assert a direct cause of action against SATOL, Villar's employer. They then allege that SATOL and the other Codefendants which each had some interest, to a greater or lesser degree, in SATOL's activities, are all "alter egos" of CMC. They then attempt to assert personal

jurisdiction over all the Defendants in Texas, where only CMC, not SATOL, is doing business.

More disturbing is the fact that Plaintiffs' jurisdictional arguments are entirely circular. On the one hand, Plaintiffs urge the Court to disregard the Codefendants' corporate status and look only to CMC's amenability to personal jurisdiction. On the other hand, Plaintiffs argue that the Court should recognize the Codefendants' as separate, alien corporations for purposes of determining subject matter jurisdiction. This argument is patently silly and exceeds the bounds of zealous advocacy. Either the Codefendants are the "alter egos" of CMC or they are not. They cannot be considered "alter egos" for some purposes and separate corporate entities for others merely to suit the needs of

Plaintiffs. See Panalpina Welttransport GMBH v. Geosource, Inc., 754 F.2d 352, 354-55 (5th Cir. 1985) ("alter ego" doctrine may be used to add additional places of citizenship for diversity purposes, but party cannot pick and chose [sic] among places of citizenship; jurisdictional rules may not be used to perpetrate fraud on the court by either improperly creating or destroying diversity jurisdiction). Cf. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 906 (1st Cir. 1980) (noting that plaintiff could not argue that subsidiary corporation was "alter ego" of parent for personal jurisdiction purposes but that subsidiary, not parent, was "employer" for purposes of workers' compensation laws).

Leaving these deficiencies aside, however, it is clear that Plaintiffs' arguments as to the "alter ego" issue are

without merit. First, it is well settled that "the mere existence of a parent-subsidiary relationship will not support the assertion of jurisdiction over a foreign parent. . . ." Dalton v. R & W Marine, Inc., supra, 897 F.2d at 1363. Indeed, it is clear that:

> Proof of an identity of shareholders or of corporate directors and officers, or of domination by the parent of its subsidiary's affairs, will not justify treatment of the two as one business unit. Nor does the parent's ownership of 100 percent of the subsidiary's stock alone defeat their separate existence.

Hargrave v. Fibreboard Corp., supra, 710 F.2d at 1162 (quoting Miles v. American Tel. & Tel. Co., 703 F.2d 193, 195 (5th Cir.1983)).

Rather, the party alleging the existence of personal jurisdiction must demonstrate that "the parent so dominates the subsidiary that 'they do not in reality

constitute separate and distinct corporate entities.'" Dalton v. R & W Marine, Inc., supra, 897 F.2d at 1363 (quoting Hargrave v. Fibreboard Corp., supra, 710 F.2d at 1159). There are several factors to be used in evaluating whether this test is satisfied. [

> [S]uch factors include whether: (1) distinct and adequately capitalized financial units are incorporated and maintained; (2) daily operations of the two corporations are separate; (3) formal barriers between management of the two entities are erected, with each functioning in its own best interests; and (4) those with whom the corporations come in contact are apprised of their separate identity. Other factors deemed important by the commentators and Texas courts are: (1) common stock ownership; (2) the method and degree of financing of the subsidiary by the parent; (3) common directors or officers; (4) separate books and accounts; (5) common business departments; (6) extent to which contracts between parent and subsidiary favor one over the other; and (7) connection of parent's employee,

> officer or director to subsidiary's tort or contract giving rise to suit.

Hargrave v. Fibreboard Corp., supra, 710 F.2d at 1162-63 (quoting Miles v. American Tel. & Tel. Co., supra, 703 F.2d at 195-96).

i. Plaintiffs' Argument.

Plaintiffs rely on Castleberry v. Branscum,[10] in which the Texas Supreme Court discussed the circumstances in which the corporate fiction should be disregarded to hold a parent corporation liable for the torts of its subsidiary. In particular, Plaintiffs focus on the Court's discussion of the different rationales for disregarding the corporate fiction. Plaintiffs appear to argue that in order to show that there is no possibility that a state court could

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[10] 721 S.W.2d 270 (Tex.1986).

exercise personal jurisdiction, the Codefendants must affirmatively negate each and every one of these possible rationales, regardless of whether there is any evidence that a particular rationale may be applicable to the instant case.

This suggestion is absurd. Even assuming that Plaintiffs are correct in their assertion that their Motion to Remand must be considered first, and that, to prevail on their fraudulent joinder claim the Codefendants must show that there is no possibility that a state court could obtain personal jurisdiction, this is not the same as requiring the Codefendants to negate every conceivable basis for personal jurisdiction, even when the record contains no evidence whatsoever to support such a basis. See Barrantes Cabalceta v. Standard Fruit Co., 667 F.Supp. 833, 836 (S.D.Fla.1987) (plaintiff

must establish at least a colorable ground for its claims), aff'd in part, rev'd in part, 883 F.2d 1553 (1989).

For example, one rationale for disregarding the corporate fiction is that the fiction has been used "to achieve or perpetrate monopoly." Castleberry, 721 S.W.2d at 272. The record contains absolutely no evidence to suggest that any of the Defendants have used a corporate fiction to engage in monopolistic practices. Since the record contains no evidence of such activity, a court could not determine to disregard the corporate fiction on this basis. Codefendants are not affirmatively required to come forward with evidence to demonstrate their lack of monopolistic activities.

Leaving this rather tortured argument aside, Plaintiffs primarily focus on those portions of the Castleberry decision which

permit the corporate fiction to be disregarded where the fiction is used to perpetrate a fraud, evade a legal obligation, or justify a wrong. Castleberry, 721 S.W.2d at 272. Plaintiffs argue that Defendants used their various corporate fictions to defraud and avoid legal obligations to Plaintiffs. In particular, Plaintiffs rely on the Affidavit and Supplemental Affidavit of John Runion ("Runion Affidavit and Supplemental Affidavit"). Mr. Runion claims to have analyzed all the relevant facts and applicable law and reached the conclusion that the Codefendants' corporate status should be disregarded for personal jurisdiction purposes. The Court finds the Runion Affidavit and Supplemental Affidavit to be

both wholly improper and untrustworthy.[11]

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[11] Mr. Runion claims to be "an independent consultant, temporarily employed by Sovereign Energy, Inc. in the capacity of Technical Consultant Business Development." Moreover, he claims to have over 20 years experience in domestic and international business. Be that as it may, nothing in the Runion affidavit suggests any reason why Mr, Runion is competent to advise this Court as to the interpretation and application of Texas law. As a Federal District Court sitting in Texas, this Court is routinely required to interpret and apply Texas law. The Court concedes that in particular cases, the testimony of a person intimately familiar with a particular area of Texas law might be appropriate. In the instant case, however, nothing suggests that Mr. Runion is in any way qualified to provide it.

Moreover, the Runion affidavit contains no facts to support its incredible conclusions. It does state some facts, such as that CMI is a subsidiary of CMC, the GTO owned 80% of SATOL, and the like, but it does not explain the basis for its conclusion that these facts demonstrate that CMC exercised such complete dominion and control over the Codefendants that all should be considered the "alter egos" of CMC. Rather, it simply repeats the same conclusory allegations without ever explaining how they are supported with facts. Indeed, it would appear that much of the Runion Affidavit is based on the premise that most of the Defendants'

For present purposes, however, it is sufficient to note that, despite the length of the Runion Affidavit, Mr. Runion's entire argument can be boiled down to the startling conclusion that because SATOL and several of the other Codefendants have been merged with other entities and/or wound up since 1977, these steps were obviously undertaken to avoid an obligation to and/or to defraud Plaintiffs. In other words, Mr. Runion's conclusions amount to nothing more substantial than post hoc ergo propter hoc.

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activities over the last ten years have been undertaken, not to pursue legitimate business ends, but to avoid a trial on the merits in this lawsuit. As noted above, this contention is without merit.

Finally, as noted below, it is clear that the Runion Affidavit contains blatant misrepresentations. Therefore, the Court explicitly finds that the Runion Affidavit and Supplemental Affidavit are not trustworthy and are entitled to no weight.

Other than the fact that the mergers and windups occurred after Mr. Villar's injuries, the record is devoid of any evidence whatsoever that the two were related. Moreover, this argument is belied by the fact that, as part of the dismissal of the California federal action, the Defendants agreed to waive all procedural and jurisdictional defenses to a suit brought in the Philippines. In other words, far from trying to avoid or defraud Plaintiffs, the Defendants specifically agreed to appear and defend in the Philippines. Defendants never defended this suit in the Philippines because Plaintiffs never filed suit there.

Finally, after a careful examination of the record and the applicable case law, the Court is convinced that, as a matter of law, the Codefendants cannot be said to be the "alter egos" of CMC.

ii. Facts

Mr. Villar was working for SATOL. At the time of Villar's death SATOL was owned jointly by two entities. 40 percent was owned by Kanoo and 60 percent by GTO. Deposition of John Maguire, September 10, 1981, Exhibit I to Defendants' Opposition and Response to Plaintiffs' Motion to Remand ("Maguire Deposition")[12] at 10 11.7-8. SATOL did not do business outside of Saudi Arabia. Id. at 73-74.

CMC has no interest in Kanoo, and has never had any such interest. Id. at 11 11.9-10. GTO was one part of a much larger joint venture between CMI, Genstar Overseas and Federal Pacific. Each owned a 1/3 interest. Id. at 11 11.20-25, 26 11.5-7. CMI is a wholly owned subsidiary

[12] All depositions cited were taken by Plaintiffs during the California litigation.

of CMC. There is no suggestion, however, that CMC has, or has had, any ownership interest in either Genstar Overseas or Federal Pacific.[13] Id. at 12 11.1-15. Affidavit of Roderick MacKinnon, Exhibit E to Defendants' Opposition and Response to Plaintiffs' Motion to Remand; Affidavit of M-E. Chlumecky, Exhibit F to Defendants' Opposition and Response to Plaintiffs' Motion to Remand. Thus, there is no evidence to support the contention that either Genstar or any of its subsidiaries or parent corporations or Federal Pacific or any of its subsidiaries or parent

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[13] Moreover, the two are not related to each other. Id. at 12 11.12-15. Additionally, the Bannock was dedicated to the joint venture by Federal Pacific or one of its subsidiaries, not by CMC. Maguire Deposition at 92; Deposition of William McLean, June 11, 1982, Exhibit K to Defendants' Motion to Remand ("McLean Deposition") at 70.

corporations were the "alter egos" of CMC.[14]

Moreover, it is clear from the record that CMC did not dominate either SATOL or GTO. First, at the time of Villar's death, CMC had, at best, a 20% ownership interest in SATOL.[15] Additionally, only two of SATOL's eight directors were connected with CMC. Two were provided by each of the corporations owning an interest in GTO, and two by Kanoo. McLean Deposition at 9 ll.15-28, 10 ll.1-3. See also Exhibit 1 to Maguire Deposition. Similarly, between 1976 and 1979 only

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[14] Moreover, the company that actually hired Villar was owned by Federal Pacific, not by CMC. Deposition of George A. Watkins, June 11, 1982, Exhibit J to Defendants' Opposition and Response to Plaintiffs' Motion to Remand ("Watkins Deposition").

[15] Subsequently GTO was acquired by CMC and became WPO. Maguire Deposition at 10 ll.18-27, 12 ll.16-21.

three of GTO's seven directors were connected with CMC. Moreover, only two of these three directors appear to have had voting privileges. Maguire Deposition at 31-32. Each director was paid by the parent company that sponsored him. Id. at 36 11.6-9. Moreover, actions could only be taken upon unanimous agreement, and CMC had no authority to override the dissent of any director, neither those it had dedicated nor those dedicated by Genstar or Federal Pacific. Id. 22 11.4-16. Moreover, the record supports the Codefendants [sic] assertions that all the Codefendants maintained the formalities of incorporation and did not function solely as a conduit for CMC. See Maguire Deposition at 17 11.23-25; Exhibits to Maguire Deposition. Additionally, SATOL had its own bank accounts in Saudi Arabia

and San Francisco,[16] handled its own marketing,[17] maintained its own staff,[18] and had its own payroll. Id. at 53. No one at CMC or any of its subsidiaries controlled the day to day operations of SATOL. Watkins Deposition at 13-17.

Of course, CMC, through CMI, exercised some control over GTO, and through GTO, over SATOL, and some employees of both GTO and SATOL retained ties to CMC. See, e.g., Watkins Deposition at 6-7. For example, as noted above, CMC contributed 3 directors to GTO and two to SATOL. However, all three owners of GTO dedicated officers to GTO, and the majority of GTO employees were furnished by Genstar and Federal Pacific.

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[16] Maguire Deposition at 59.

[17] McLean Deposition at 59.

[18] Maguire Deposition at 55-56.

Maguire Deposition at 32 11.14-18, 35 11.2-6. Also, GTO maintained offices in the CMC office complex, although not all GTO employees were on the CMC payroll. Watkins Deposition at 9-11. Some CMC employees acted as or procured persons to act as supervisory staff for SATOL. Id. at 15 11.1-12. SATOL secured some, but not all, if its supplies from the Merrett Ship Supply, which is at least partially owned by CMC. Id. at 15 11.16-27. Such connections, however, are woefully insufficient to support an allegation that either GTO or SATOL was the "alter ego" of CMC.

iii. Case Law

While the determination of whether to disregard the corporate entity requires "a flexible fact-specific approach focusing

on equity,"[19] the case law indicates that much greater showing is required than is present here. In several cases, courts have refused to disregard the corporate entity, despite a stronger connection between the parent and the subsidiary.

For example, in Hargrave v. Fibreboard Corp., supra, the parent corporation owned 100% of the stock of the subsidiary, had complete authority over general policy, including product selection, officer retention, and investment approval.[20] The Fifth Circuit held that the subsidiary was not the "alter ego" of the parent corporation and

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[19] Castleberry v. Branscum, supra, 821 S.W.2d at 273.

[20] Significantly, the corporations involved, like the corporations here scrupulously observed corporate formalities, including the maintenance of separate bank accounts, filing separate tax returns and the like.

that the parent's authority over the subsidiary "was no more than that appropriate for a sole shareholder of a corporation, and certainly not enough to warrant the extra-territorial exercise of jurisdiction over that shareholder under the Texas statute." 710 F.2d at 1161.

More recently, in Dalton v. R & W Marine, supra, the Fifth Circuit held that several subsidiary corporations were not the "alter egos" of their parent even though: 1) the parent owned 100% of all its subsidiaries' stock and was responsible for general policy; 2) the subsidiaries funneled their revenues into centralized bank accounts and filed joint tax returns with the parent; and 3) the parent offered a benefit plan to the subsidiaries' employees. The court held that the question was a close one, but that the above factors were outweighed by

the parent's observation of corporate formalities and the fact that the subsidiaries were responsible for daily operations, kept their own books, and filed separate state tax returns. 897 F.2d at 1859.

In the instant case, the question is not nearly as close as it was in Dalton. CMC was always only a partial owner of SATOL and held only a 1/3 interest in GTO until some two years after Villar's death. CMC never held any interest in the other two owners of GTO. GTO policy was determined by a management committee which included members from all three owner corporations, not just from CMC. A unanimous decision was required before any action could be taken and CMC had no power to override the dissent of any director. Moreover, no one at CMC or any of its subsidiaries had any control over the day

to day operations of SATOL. In short, it is clear that, under Texas law, none of the Codefendants can be considered the "alter ego" of CMC. See also Edwards Co. v. Monogram Indus. Inc., 730 F.2d 977, 98487 (5th Cir.1984) (en banc); In re Blanton, 105 B.R. 811 (Bankr. W.D.Tex.1989); Lucas v. Texas Indus., Inc., 696 S.W.2d 372,374-76 (Tex.1984); 3-D Elec. Co. v. Barnett Constr. Co., 706 S.W.2d 135, 138-46 (Tex.App.--Dallas 1986, writ ref'd n.r.e.).

2. General Jurisdiction and Plaintiffs' Request for Further Discovery.

Plaintiffs request, however, that they should be allowed more time to conduct discovery on the issue of personal jurisdiction. They assert that they have never had the opportunity to conduct such discovery, that there is some evidence that certain Codefendants have other, spe-

cific contacts with Texas not present in the record, and that the Defendants have, by merging and reorganizing various entities, acted to improperly defeat the exercise of personal jurisdiction. The Court does not agree.

First, the plaintiffs had ample opportunity to conduct discovery as to the forum non conveniens issue during the California portion of this litigation. While the two issues are not absolutely identical, the forum non conveniens determination necessarily involves an inquiry as to the parties' activities in various forums. See Wood v. Santa Barbara Chamber of Commerce, Inc., 507 F.Supp. 1128, 1137-38 (D.Nev.1980) (requirement of reasonableness for exercise of personal jurisdiction may be judged by standards analogous to those used to decide forum non conveniens motions). This discovery

revealed only one potentially significant contact between only one of the Codefendants and the State of Texas.

Plaintiffs argue, however, that this one contact demonstrates Defendants lack of good faith such that Plaintiffs should be allowed more time for discovery. In particular, Plaintiffs rely on the Runion Affidavit which asserts that Defendants have attempted to conceal GTO's contacts with Texas. Mr. Runion bases this conclusion on a portion of the Maguire Deposition. The Runion Affidavit quotes the Maguire Deposition as follows:

> Q: Does Crowley [CMC] maintain an office in Houston?
>
> A: Yes, Crowley has an office [sic] Houston. GTO had an office in Houston as well. . . .
>
> Q: Is that not a subsidiary of CMC?
>
> A: Oh yes, but that would be just <u>part of</u> [sic] <u>Crowley bag of tricks,</u> you know.

Runion Affidavit at 9 (emphasis added in affidavit).

In their pleadings, Plaintiffs repeatedly refer to Mr. Runion's conclusion, based on the above passage, that Defendants have somehow engaged in trickery to defeat personal jurisdiction and otherwise avoid their obligations to Plaintiffs.

However, the Runion Affidavit omits a crucial portion of the Maguire Deposition. The entire exchange reads as follows:

> Q: Does Crowley maintain an office in Houston?
>
> A: Yes. Crowley has an office in Houston. GTO had an office in Houston as well.
>
> Q. Does it still?
>
> A: It does not.
>
> Q. Did it have one there in '77?
>
> A: It may very well have.
>
> Q: Well Brinkerhoff has no office in Houston does it?

> A: Brinkerhoff, to my knowledge, does not have an office in Houston.
>
> Q: Is that not a subsidiary of CMC?
>
> A: Oh, yes, but that would be just part of the Crowley back of tricks, you know.

Maguire Deposition at 79 ll.13-25.

In other words, the "bag of tricks" line, whatever its intended meaning, does not refer to GTO or to CMC's relationship with GTO, but to Brinkerhoff, who is not a party to this litigation. This passage demonstrates, not that Defendants have failed to act in good faith, but that, at best, Plaintiffs have relied on an obvious and easily discoverable misrepresentation.

Moreover, at best, the Maguire deposition establishes that, at some time, GTO had an office in Houston. This, without more, is insufficient to establish GTO's "continuous and systematic" general

business contacts with Texas such that this Court may exercise personal jurisdiction over GTO. Helicopteros Nacionales de Colombia, S.A. v. Hall, supra, 466 U.S. at 413-18, 104 S.Ct. at 1871-74. Yet despite Plaintiffs' protestations to the contrary, there is no evidence that any "more" exists. It is admitted that CMC is doing business in Texas. Beyond that, however, it does not appear that any of the Codefendants have anything but the most transitory of contacts with the State of Texas. Plaintiffs have been pursuing this litigation in this country for over ten years, and yet the record indicates only that GTO once maintained an office in Texas, and that, on occasion, vessels under the control of one or more of the Codefendants may pass through a Texas port. This is not enough to sustain the

exercise of general personal jurisdiction and does not seem likely to lead to anything that would support the exercise of jurisdiction. Indeed, Plaintiffs have been forced to rely on a most obvious and blatant misrepresentation to even assert that some ground of personal jurisdiction other than the "alter ego" doctrine exists. In the Court's view, more discovery would only serve to further vex and harass Defendants. Therefore, the Court declines to grant Plaintiffs extra time to conduct discovery.

B. Fairness

Even assuming that Codefendants have sufficient contacts with Texas, the exercise of general personal jurisdiction would not be consistent with "traditional notions of fair play and substantial justice." In evaluating the fairness of the exercise of personal jurisdiction, a

court must consider several factors: the burden of the defendant; the forum state's interest in the dispute; the plaintiff's interest in obtaining relief; the judicial system's interest in having the suit resolved efficiently; and the interest of the several states in furthering social policies. Asahi Metal Indus. Co. v. Superior Court, supra, 480 U.S. at 113, 107 S.Ct. at 1032-33.

The State of Texas has no interest in this case; it does not involve Texas citizens, Texas property, or Texas law. Outside of CMC, the only participants with any ties to Texas are the attorneys. Moreover, resolution of this dispute in Texas will in no way further the judicial system's interest in efficient dispute resolution or the interests of the several states. This case involves the application of foreign law to a dispute

between Philippine plaintiffs and, with the exception of CMC, alien defendants. While Plaintiffs' offer to pay the travel expenses of witnesses and the like might in some way reduce the financial burden Codefendants would surely face if required to defend in Texas, it in no way makes it any more "fair," in terms of the relevant factors, to require Codefendants to defend this suit either in this Court or in Texas state court. Therefore, the Court finds that even if the Codefendants' contacts with Texas could be said to be continuous and systematic, the exercise of personal jurisdiction would not be fair and reasonable. See Dalton v. R & W Marine, Inc., supra, 897 F.2d at 1363; Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987).

C. Court's Ruling

On a motion to dismiss for lack of

personal jurisdiction, the plaintiff bears the initial burden of establishing that jurisdiction exists. Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir.1988); Nolan v. Boeing Co., supra, 736 F.Supp at 127. Plaintiffs have failed to make a prima facie showing that any of the Codefendants have continuous and systematic contacts with the State of Texas or that any of the Codefendants are the "alter ego" of CMC. Therefore, the Court finds that it cannot exercise personal jurisdiction over any of the Codefendants. The Codefendants' Motion to Dismiss is therefore GRANTED. With the departure of the Codefendants, complete diversity now exists between the Plaintiffs and CMC, the remaining Defendant. Therefore, the Plaintiffs'

Motion to Remand is DISMISSED AS MOOT.[21]

III. FORUM NON CONVENIENS

The Court now turns to CMC's Motion to Dismiss for Forum Non Conveniens. CMC argues first, that the forum non conveniens dismissal granted by United States District Court for the Northern District of California is res judicata for purposes of this action. Alternatively, CMC argues that a forum non conveniens dismissal is appropriate under controlling

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[21] The Court has found that it may consider Defendants' Motion to Dismiss first. Alternatively, assuming that Plaintiffs are correct and the Court must consider their Motion to Remand first and must grant such motion unless Defendants demonstrate that there is no way in which Plaintiffs can establish personal jurisdiction over the Codefendants, the Court nevertheless finds that, based on these facts, there is no possibility that Plaintiffs could establish personal jurisdiction over the Codefendants. Viewed in this procedural posture, the Court would first deny Plaintiffs' Motion to Remand and then grant Codefendants' Motion to Remand.

principles of federal law.

A. Res Judicata

As between the same parties, a final judgment on the merits rendered by a court of competent jurisdiction is a bar to all future actions based on the same transaction or occurrence. Robinson v. National Cash Register Co., supra. 808 F.2d at 1124. In the instant case, the California federal district court granted a forum non conveniens dismissal in favor of CMC and against Plaintiffs. That court's jurisdiction is not challenged. Therefore, the only question is whether such dismissal was a final judgment on the merits. If so, then CMC is entitled to a dismissal on the basis of res judicata.

A forum non conveniens dismissal in one forum does not necessarily preclude the maintenance of an identical suit in another forum. See, e.g., Mizokami Bros.

v. Mobay Chem. Corp. 660 F.2d 712, 716-17 (8th Cir.1981)(Missouri federal court not required to dismiss suit that had been dismissed by Arizona court for forum non conveniens). In the instant case, however, a California federal court has already granted a forum non conveniens dismissal on the ground that a foreign forum rather than any forum in the United States is the appropriate forum. Moreover, there is absolutely nothing, and, in particular, Plaintiffs have not drawn the Court's attention to anything, to suggest that Texas is a more convenient forum than California (where CMC has its principal place of business). Indeed the record suggests that Texas is, if anything, less convenient. Under these circumstances, the Court believes that the California court's prior dismissal should be binding on this Court.

In Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir.1987), rev'd, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), a Fifth Circuit panel held that:

> [O]nce a court of competent jurisdiction has squarely passed on an issue fairly moots between the same parties, on the merits of the cause or otherwise, that issue may not be relitigated. In the case of forum non conveniens, the plaintiff in the new forum must do more than ask for a rebalancing of forum non conveniens considerations. He must show objective facts relevant to the issue that materially alter the considerations underlying the previous resolution.

Id. at 314.

Although Chick Kam Choo was ultimately reversed by the Supreme Court, the panel's forum non conveniens analysis was not disapproved. This Court believes that Chick Kam Choo represents the current state of the law, at least in this

circuit.[22]

In the instant case, the California district court determined that a Philippine forum was more appropriate than an American forum, not just more appropriate than a California forum. Moreover, Plaintiffs have presented no new arguments to this Court that Would suggest that this Court should rebalance the relevant factors in a different manner, or that, were this Court to undertake a forum non conveniens analysis, it should consider any factors other than those

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[22] Besides the decision in Chick Kam Choo, the Court's holding is supported by the Third Circuit's decision in Pastewka v. Texaco, Inc., 565 F.2d 851 (3d Cir.1977) in which the court held that a forum non conveniens dismissal granted by a New York district court and upheld by the Second Circuit was binding on a Delaware district court where the objective criteria and the material facts underlying them were the same in both cases. Id. at 854. See also Barrantes Cabalceta b. Standard Fruit Co., 667 F.Supp. at 838.

already considered by the California court. Rather, Plaintiffs appear to be motivated solely by a desire to take advantage of Texas's "open courts" doctrine.[23] Under these circumstances, the Court believes that this action is barred by res judicata as a result of the prior forum non conveniens dismissal by the District Court for the Northern District of California.

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[23] Under Texas law, a court may not dismiss a personal injury or wrongful death action for forum non conveniens. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 677-79 (Tex.1990), cert. denied, _____ U.S. _____, 111 S.Ct. 671, 112 L.Ed.2d 663 (1991). It is clear from the record however, that, as compared to California, CMC has fewer contacts with Texas, Texas has less interest in deciding this case, and Texas would be at least as inconvenient a forum. Moreover, as noted infra note 34. Under these circumstances, and given that Plaintiffs have introduced no new objective facts that material alter the California court's determination, the Court does not see how the fact that Texas law does not recognize the doctrine of forum non conveniens is in any way relevant to the Court's decision.

B. Forum Non Conveniens

Even assuming, however, that this action is not barred by res judicata, the Court finds that CMC's Motion to Dismiss for Forum Non Conveniens should be GRANTED.

1. Choice of Law

As a threshold matter, Plaintiffs argue that Texas forum non conveniens law, not federal law, should provide the rule of decision. This contention is erroneous. Admittedly, the Supreme Court has not decided whether a federal court sitting in diversity should apply federal or state forum non conveniens law.[24]

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[24] However, virtually all lower courts that have held that federal law applies. See Robertson & Speck, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions, 68 Texas L.Rev. 937, 954 n.99 (1990). At least one recent Supreme Court decision suggests that the Supreme Court would agree. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30-32, 108 S.Ct.

However, the Fifth Circuit has held that federal law, not state law, provides the rule of decision. In In re Air Crash Disaster,[25] the Fifth Circuit carefully weighed the factors both for and against the application of state and federal forum non conveniens law. The court recognized that a forum non conveniens dismissal is an "outcome-determinative," and that ignoring state law might encourage forum shopping. Id. at 1156-58. The court concluded, however, that "the interests of the federal forum in self-regulation, in administrative independence, and in self-

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2239, 2244-45, 101 L.Ed.2d 22 (1988) (holding that federal, not state, law controls interpretation and effect of a forum selection clause).

[25] 821 F.2d 1147 (5th Cir.1987) (en banc), vacated on other grounds sub nom. Pan Am World Airways, Inc. v. Lopez, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400, aff'd in relevant part and vacated in part, 883 F.2d 17 (5th Cir. 1989).

management" necessitated the application of federal law. Id. at 1159. Thus, in this circuit, federal law controls forum non conveniens determinations in federal court. Nolan v. Boeing Co., 919 F.2d 1058, 1068 n. 11 (5th Cir.1990), cert. denied, ____ U.S.____, 111 S.Ct. 1587, 113 L.Ed.2d 651 (1991); Bastoe v. Sterling Drug, Inc., 683 F.Supp. 586, 587 (S.D.Miss. 1988).[26]

Plaintiffs assert, however, that in In re Air Crash Disaster, the Fifth Circuit left open the question of whether state or federal forum non conveniens law

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[26] Moreover, this rule represents the majority position. See Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1217-19 (11th Cir.), cert. denied, 474 U.S. 948, 106 S.Ct. 347, 88 L.Ed. 294 (1985); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3828, at 293-94 (1986); Robertson & Speck, supra, 68 Texas L.Rev. at 954 n.99; Speck, Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul, 18 J.Mar.L. & Com. 185, 197 (1987).

applies in a diversity case that has been removed from state court. This position is ridiculous. First, the Fifth Circuit's holding in In re Air Crash Disaster was that federal forum non conveniens law applies in all diversity cases, not just those originally filed in federal court. In re Air Crash Disaster, supra, 821 F.2d at 1159.[27] More generally, a federal court sitting in diversity must apply federal or state law according to the dictates of the time honored rule of Erie R.R. v. Tompkins,[28] but irrespective of whether the case was originally filed in

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[27] In support of their arguments, Plaintiffs quote extensively from those portions of the opinion which discuss the benefits of applying state forum non conveniens law. In the end however, the Fifth Circuit rejected this approach. In re Aircrash Disaster, supra, 821 F.2d at 1159.

[28] 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

federal court or was removed to federal court from state court. In many respects, the removal statute[29] is the mirror image of the diversity statute.[30] The latter often allows foreign plaintiffs to obtain a more neutral forum within which to resolve their disputes against resident defendants. See, e.g., Chick Kam Choo v. Exxon Corp., supra, 764 F.2d at 1152-53 & n. 3. Conversely, the former often permits nonresident defendants to obtain a more neutral forum as against resident plaintiffs. However, regardless of whether a diversity case was originally filed in federal court or removed from state court, an issue is either controlled by federal law or it is not. Plaintiffs

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[29] 28 U.S.C.A. §1441 (West 1973 & Supp. 1991).

[30] 28 U.S.C.A. §1332 (West 1966 & Supp. 1991).

have cited no cases, and the Court has found none, to support the extraordinary proposition that federal law may govern an issue in a case originally filed in federal court but state law may govern that same issue in an otherwise identical case that was removed from state court. To hold otherwise would require this Court to establish a new rule which is inconsistent with the entire body of Erie jurisprudence.

2. Application of Federal Forum Non Conveniens Law.

Before dismissing a case for forum non conveniens, a court must first determine whether an adequate foreign forum exists. In re Air Crash, supra, 821 F.2d at 1165. An adequate forum is one in which all parties are subject to jurisdiction, the entire case can be heard, and all parties will be treated

fairly. Id. In the instant case it appears that Plaintiffs have allowed the Philippine statute of limitations to expire. This does not mean, however, that the Philippines is no longer an adequate forum. The District Court for the Northern District of California determined that this action should be heard in the Philippines: Plaintiffs are Philippine citizens; Philippine law applies;[31] and the accident took place in Saudi Arabia, much closer to the Philippines than to the United States. Moreover, to ensure that the Philippines was an adequate forum, the district court conditioned its dismissal on Defendants' agreement to waive certain procedural defenses to any action brought within one year in the Philippines based on Mr. Villar's death. Villar v. Crowley

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[31] See note 4, supra.

Maritime Corp., supra, 782 F.2d at 1482-83. Plaintiffs' failure to initiate such an action cannot serve as a reason for this Court to conclude that an adequate foreign forum does not now exist. Otherwise, every Defendant suffering a forum non conveniens dismissal with instructions to pursue the case in a foreign forum would simply wait until the foreign forum's statute of limitations expired and then refile in the United States.

If an adequate forum is available, the Court must then balance the public and private interest factors outlined by the Supreme Court in Gulf Oil Corp. v. Gilbert.[32] The private interest factors include:

[T]he relative ease of access to

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[32] 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947).

> sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 508, 67 S.Ct. at 843.

The relevant public factors include the administrative difficulties caused by crowded dockets, the burden of imposing jury duty on citizens of a forum with no relation to the dispute, the local interest in having localized controversies decided in that locality, and the appropriateness of deciding diversity cases in the forum whose law provides the substantive rules of decision. Id. at 509-09.

After carefully examining the record,

the Court is convinced that there is absolutely nothing to warrant a different determination than that given by the District Court for the Northern District of California. As to the private factors, Plaintiffs are residents of the Philippines; they are closer to a Philippine forum than to an American forum. Moreover, Plaintiffs' choice of an American forum is entitled to less weight because they are not American citizens. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 & n. 23, 102 S.Ct. 252, 265-66 & n. 23, 70 L.Ed.2d 419 (1981). Additionally, there is no evidence to indicate that the cost of obtaining witnesses will be any more difficult in the Philippines than in Texas. While some potential witnesses, specifically some employees of CMC, may reside in the United States (although not in Texas), the Plaintiffs are Philippine

citizens and the record does not indicate the citizenship of the eyewitnesses to the accident. Finally, the accident took place in Saudi Arabia. Should a view of the accident site be necessary, a Philippine forum would be more convenient than a Texas forum. Thus, on balance, the private interest factors favor a forum non conveniens dismissal. See Villar v. Crowley Maritime Corp., supra, 782 F.2d at 1482-83.

Similarly, the public interest factors clearly favor dismissal. This controversy is governed by foreign law.[33] A Philippine court is better placed to apply Philippine law, and at least as well placed to apply Panamanian and Saudi Arabian law, than is a Texas court. Moreover, the Philippines has a strong

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[33] See note 4, supra

interest in deciding this case because of its relationship to both Plaintiffs and Mr. Villar. By contrast, beyond the general fact that CMC does business in Texas, the State of Texas has no interest in this case, and it would be an undue imposition on both Texas court personnel and Texas jurors to have this case adjudicated in Texas. See id. at 1483.

IV. INJUNCTION AGAINST FURTHER SUITS

This is the third suit Plaintiffs have filed based on the death of Mr. Villar. Over five years ago, Plaintiffs were informed that the Philippines was the appropriate forum for this lawsuit. At the time, Defendants stood ready to defend in a Philippine court. Plaintiffs have never brought suit in the Philippines, however. Instead, they have continued to pursue Defendants in American courts,

first in California, now in Texas. Further litigation in American courts can serve no purpose other than to vex and harass Defendants.[34] Therefore Plaintiffs

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[34] Additionally, attempting to pursue Defendants in Texas state court is not a viable option for Plaintiffs because the state court would, on the particular facts of this case, be required to apply federal, not state, forum non conveniens law. As noted above, Texas law does not recognize forum non conveniens law in wrongful death and personal injury cases. Dow Chem. Co. v. Castro Alfaro, supra, 786 S.W.2d at 677-79. However, in Exxon Corp v. Chick Kam Choo, supra, 817 F.2d at 324, a Fifth Circuit panel held that under the so called reverse-Erie doctrine federal forum non conveniens law preempts state law in maritime cases. Although the court's order enjoining a state court proceeding was ultimately reversed by the Supreme Court, the Court did not disapprove of the panel's reverse-Erie analysis, and, indeed, appeared to suggest that this portion of the panel's opinion was correct. See Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149-150, 108 S.Ct. at 1692 (White, J., concurring). It is this Court's opinion that Chick Kam Choo represents the current state of the law in this circuit on this issue. See Camejo v. Ocean Drilling & Exploration, 838 F.2d 1374, 1382 (5th Cir.1988). Therefore, a state court would, on the facts of this case, be required to apply federal forum

are hereby ENJOINED from instituting any new proceedings based on the facts underlying this dispute in any federal court, in any Texas state court, or in any other state court.[35] See Combrowski v. Pfister, 380 U.S. 479, 484 n. 2, 85 S.Ct. 1116, 1119-20 n. 2, 14 L.Ed.2d 22(1965) (noting that Anti-Injunction Act, 28 U.S.C.A. § 2283 (West 1978) does not preclude injunctions prohibiting the institution of state court suits); Robertson & Speck, supra, 68 Texas L.Rev. at 956 n. 118 (1990) (noting that a federal court may enjoin parties from filing a state court suit as a part of a forum non conveniens dismissal).

V. SANCTIONS

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non conveniens law. Since this Court has already done so, that issue may be relitigated in state court.

[35] Except of course for an appeal from a judgment of this Court.

28 U.S.C.A. § 1927 (West Supp. 1991) prohibits the persistent prosecution of meritless claims. An attorney who violates section 1927 may be required to satisfy personally the costs, expenses, and attorneys' fees of the opposing party. Similarly, Fed.R.Civ.P. 11 prohibits frivolous filings and the misuse of judicial resources to harass the opposing party. Robinson v. National Cash Register Co., supra, 808 F.2d at 1130.

> [W]hile enthusiasm and innovations in advocacy are to be encouraged, an attorney is under the correlative obligations to conduct himself in a manner consistent with the proper functioning of the judicial system. A person cannot proceed with impunity when his argument has no merit.

Id. at 1131 (citation omitted).

Simply put, Rule 11 requires that, before signing a pleading, an attorney must make a reasonable inquiry to

determine that such pleading is supported by existing law or by a good faith argument for a change, extension, or modification of existing law. At a minimum, an attorney must have some reasonable basis for his pleadings. See Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir.1986). This requirement applies to every paper signed during the course of the litigation. The attorney's conduct is evaluated as of the time the paper was signed, although the substance of a series of filings may indicate a pattern of conduct that violates Rule 11. Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 875 (5th Cir.1988) (en banc).

Once a violation of Rule 11 is found, a district court must impose sanctions. The court should attempt to fashion sanctions to meet Rule 11's goal of deterrence, punishment, and compensation.

The sanctions imposed must be reasonable, but beyond that the district court retains broad discretion to fashion an appropriate penalty. Id. at 878-80.

In the instant case the Court finds that Plaintiffs' counsel has engaged in several sanctionable activities. First, Plaintiffs' counsel has repeatedly urged in several pleadings the theory that the Codefendants were subject to personal jurisdiction in Texas because they were all the "alter ego" of CMC. The Court finds this argument unreasonable for several reasons. First, Plaintiffs' counsel has also argued that this case should be remanded for lack of complete diversity. To accept both these arguments the Court would have had to accept the startling proposition that the Codefendants could be considered the "alter egos" of CMC for personal

jurisdiction purposes but could be considered as separate and independent corporate entities for subject matter jurisdiction purposes. This position is unreasonable. It is not supported by existing law or a good faith argument for a change, modification, or extension of existing law. Indeed, to so hold would be to fly in the face of reason itself.

Moreover, based on the record it was unreasonable for Plaintiffs' counsel to assert that any of the Codefendants could be considered the "alter ego" of CMC. As noted above, there are numerous cases in which courts have refused to find that a subsidiary is an "alter ego" of its parent even though there are more ties between the two than between CMC and any of the Codefendants. Beyond this, however, it was patently unreasonable for Plaintiffs' counsel to assert that Federal Pacific,

Genstar Overseas, or any of their subsidiaries were the "alter egos" of CMC. CMI, a wholly owned subsidiary of CMC, Federal Pacific, and Genstar Overseas were partners in a joint venture which included joint ownership of GTO. The record does not contain a shred of evidence to support an allegation that CMC ever owned any stock in or exercised the slightest degree of control over Federal Pacific or Genstar Overseas or any of their subsidiaries.[36] Such an allegation is wholly without foundation. See Peregoy v. Amoco Production Co., 929 F.2d 196 (5th Cir.1991).

Additionally, the Court finds unreasonable the argument that while a federal court is bound to apply federal

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[36] Except to the extent that CMC bought out Genstar Overseas' and Federal Pacific's interests in GTO sometime after Villar's death.

forum non conveniens law to a case originally filed in federal court, it may apply state law to a case removed to federal court from state court. This argument is indefensible. There is not a jot of support, either in the case law or in commentary, to support such a conclusion. As noted above, Plaintiffs' counsel has, in pressing this position, repeatedly misstated the Fifth Circuit's holding in In re Air Crash Disaster. See Spiller v. Smithers, 919 F.2d 339 (5th Cir.1990). Moreover, acceptance of counsel's argument would require this Court to go against almost every case that has ever considered the Erie doctrine. Therefore, the Court finds that counsel's argument is not supported by existing law or by a good faith argument for change or modification of existing law.

Finally, and most disturbingly,

Plaintiffs' counsel has repeatedly relied on the Runion affidavit to support the argument that Defendants have engaged in bad faith and have otherwise attempted to avoid their obligations to Plaintiffs. As noted above, the Runion affidavit, besides being wholly improper and unsatisfactory, contains a blatant misrepresentation of deposition testimony. Plaintiffs' counsel has repeatedly relied on this misrepresentation in several pleadings. At the very best, Plaintiffs' counsel has relied on an easily discoverable falsehood that should have been discovered in the exercise of reasonable care and diligence. At worst, Plaintiffs' counsel has conspired with Mr. Runion in a deliberate attempt to mislead this Court.

In the Court's view, the activities of Plaintiffs' counsel clearly warrant sanctions. At this time, the Court is

inclined to issue the following Order:

> Plaintiffs counsel is hereby ORDERED to pay sanctions in the amount of $10,000.00. In addition, Plaintiffs' counsel are ORDERED to pay all of Defendants' expenses incurred in connection with this action, including costs, expenses, and attorneys fees. Within 10 days after the entry of this Order, Defendants will submit an order which is consistent with the Fifth Circuit's opinion in Johnson v. Georgia Highway Dept., 488 F.2d 714 (5th Cir.1974) listing all expenses including attorneys fees. Plaintiffs counsel must pay both the fine and the Defendants' expenses within 20 days thereafter (i.e. within 30 days after the entry of this Order). Failure to pay the $10,000.00 or the Defendants' expenses as approved by the Court will be treated as an act of civil contempt. This Order will not be stayed pending appeal. Plaintiffs' counsel and his firm will be held jointly and severally liable for all such sanctions.

However, the Due Process Clause of the Fourteenth Amendment requires that counsel be given notice and an opportunity

to respond before sanctions are imposed.[37] Therefore, Plaintiffs counsel is hereby ORDERED to show cause, within ten days of the date of this Order, why such sanctions should not be imposed within ten days of the date of this ORDER. Failure to respond will be taken as an indication of no opposition.

IV. COURT'S RULING.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that Codefendants' Motion to Dismiss for Want of Personal Jurisdiction is GRANTED.

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[37] Where sanction are to be imposed for filing pleadings with no basis in fact, the existence of Rule 11 itself is sufficient notice. Spiller v. Smithers, supra, 919 F.2d at 346. Where sanctions are to be imposed for filing pleadings with no basis in law or for advancing dilatory arguments, specific notice must be given. Id. at 347. The opportunity to respond is mandated. However, a formal hearing is not required, especially where, as here, the trial judge has full knowledge of the relevant facts. See id.

It is further ORDERED that Plaintiffs' Motion to Remand is DENIED AS MOOT.

It is further ORDERED that Defendant CMC's Motion to Dismiss is GRANTED ON GROUNDS OF RES JUDICATA AND, IN THE ALTERNATIVE, FOR FORUM NON CONVENIENS.

It is further ORDERED that, except for an appeal of this Court's judgment, Plaintiffs are ENJOINED from filing any new proceedings in connection with the events underlying this suit in any state or federal court of the United States.

It is further ORDERED that, except for a response regarding Rule 11 sanctions, Plaintiffs are to file no further pleadings in this Court, on any matter addressed by this Order. Any further relief in this cause, save and except the Rule 11 sanction response, and the Court's consideration thereof, shall

be sought from the United States Court of Appeals for the Fifth Circuit.

It is further ORDERED that Plaintiffs' counsel will show cause within ten days of the date of this Order why he should not suffer sanctions as outlined in Part V of this Order.

IT IS SO ORDERED.

APPENDIX B

Nenita S. VILLAR, Etc., et al.,

Plaintiffs-Appellants,

v.

CROWLEY MARITIME

CORPORATION, et al,

Defendants-Appellees

Nenita S. VILLAR, Etc.,

et al., Plaintiffs

Gary Riebschlager and Benton

Musslewhite, Appellants,

v.

CROWLEY MARITIME

CORPORATION, et al.,

Defendants-Appellees.

Nos. 92-7162, 93-7036.

United States Court of Appeals,

Fifth Circuit.

May 25, 1993.

Benton Musslewhite, Gary Reibschlager, O'Quinn, Kerensky, McAninch, P.C., Houston, TX, for plaintiffs-appellants.

Jack L. Allbritton, Fulbright & Jaworski, Houston, TX, for Crowley Maritime Corp.

Appeals from the United States District Court for the Southern District of Texas.

Before JOHNSON, JOLLY, and DAVIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This suit is the third successive one that the plaintiffs have brought for the wrongful death of Renerio Z. Villar, a citizen of the Philippines. In the first two suits, California state and federal courts dismissed the plaintiffs' suit based on forum non conveniens. Furthermore, the Ninth Circuit held that

no forum in the United States would be convenient. Yet, over ten years after filing the first suit, the plaintiffs brought the instant suit in Texas state court. The defendants removed the suit to federal court. The federal court dismissed the claims against the foreign defendants because the district court lacked personal jurisdiction over them. The district court then dismissed the claims against the remaining defendant because the district court was an inconvenient forum, 780 F.Supp. 1467. Finding that the plaintiffs' arguments are without merit, we affirm the decision of the district court.

I

In the 1970's, Villar worked in Saudi Arabia as a crew member aboard the tugboat BANNOCK. Villar worked for defendant SATOL, a Saudi Arabian corporation, under

an employment contract executed in the Philippines. Villar's employment contract provided that if he was injured in the course of his employment, he could choose compensation under either the Philippines's worker's compensation law or the law of country in which the BANNOCK was registered. It turns out that the BANNOCK was registered under Panama's flag.

In March of 1977, Villar fell overboard and drowned. At that time, defendant GTO Corporation owned sixty percent of SATOL, Villar's employer. Defendant Crowley Maritime Corporation ("CMC"), in turn, owned one-third of GTO.

In 1980, Nenita S. Villar, Josephine Villar, Geraldo Villar, Reynaldo Villar, and Renerio Villar, Jr. (hereinafter "the Villars") sued SATOL, GTO, CMC, and other related corporations in the United States

District Court for the Northern District of California. Four years later, the California district court dismissed the Villars' suit on grounds of forum non conveniens. The district court conditioned its dismissal on the defendants' agreement to waive all jurisdictional, venue, and statute of limitations defenses to any action the Villars brought in the Philippines in the next year. The Ninth Circuit affirmed the dismissal in February of 1986. Villar v. Crowley Maritime Corp., 782 F.2d 1478 (9th Cir.1986).

After the first dismissal, the Villars chose not to sue the defendants in the Philippines. Instead, the Villars filed an identical lawsuit in California state court. The California state court, like the California federal court, dismissed the Villars' suit based on the

doctrine of forum non conveniens, and in December of 1990 the California Court of Appeals affirmed. The Villars still have not attempted to sue in the Philippines, Saudi Arabia, or Panama.

II

The persistent Villars have now sued the same defendants in Texas state court. One of the weary defendants, CMC, removed the proceeding to federal court based on diversity of citizenship. CMC is a Delaware corporation that is registered to do business in Texas and has its principal place of business in California. Although some of the defendant corporations are foreign corporations and, hence, not diverse with the Villars, CMC alleged that the Villars fraudulently jointed the foreign corporations to defeat diversity jurisdiction. CMC further argued that the district court should ignore the

citizenship of the foreign corporations because there was no way the district court could constitutionally exercise in personam jurisdiction over those defendants. CMC then moved to dismiss the claims against it on grounds of forum non conveniens, and the foreign corporations moved to dismiss the action against them because the district court lacked personal jurisdiction over them.

In response, the Villars moved to remand the proceeding to Texas state court because there was incomplete diversity of citizenship. The Villars urged the district court to consider their motion to remand before considering the defendants' motions to dismiss. In case the district court rejected their primary argument, the Villars made three alternative arguments. First, the Villars argued that they had not fraudulently joined the foreign

corporations. Second, they argued that the court does have personal jurisdiction over the foreign defendants because CMC, which is in Texas, was the alter ego of at least some of the foreign defendants. Thus, the district court should attribute CMC's Texas contacts to the foreign defendants, giving the district court jurisdiction over those defendants. Finally, the Villars argued that the district court should deny CMC's motion to dismiss based on forum non conveniens because, as a federal court sitting in diversity, the district court should apply Texas state law, which does not recognize the doctrine of forum non conveniens.

Deciding the foreign defendants' motions first, the district court found that the Villars had failed to make a prima facie case for the district court's personal jurisdiction over those

defendants. The district court found that the foreign defendants did not have the necessary minimum contacts with the state of Texas, and that they were not the alter egos of CMC. Having dismissed the claims against the foreign corporations, the district court found that complete diversity existed and denied the Villars' motion to remand to state court. Alternatively, the district court held that, even if it must consider the Villars' motion first, complete diversity still existed because there was "no possibility" that the Villars could establish that the court had personal jurisdiction over the foreign defendants. Thus, the district court would still deny the Villars' motion to remand and grant the foreign defendants' motion to dismiss.

The district court then turned to CMC's motion to dismiss for forum non

conveniens, which it granted. The district court held that after the California district court dismissed the Villars' suit based on forum non conveniens, the issue became res judicata. Alternatively, the district court held that the Fifth Circuit's law on forum non conveniens applied, and that the Fifth Circuit's law required the dismissal of the action against CMC.

In addition, the district court, sua sponte, enjoined the Villars from instituting another action based on the underlying dispute in any other state or federal court in the United States. Finally, the district court sanctioned the Villars' attorneys under Rule 11 of the Federal Rules of Civil Procedure, for making unreasonable and insupportable

arguments.[1]

Complaining of multiple errors below, the Villars appeal all of the district court's orders.

III

A

The Villars' primary point on appeal is that the district court erred when it chose to consider the foreign defendants' motion to dismiss for lack of personal jurisdiction before considering their

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[1] In their original notice of appeal, the Villars' attorneys failed to appeal the district court's Rule 11 sanctions in their own names as required by our rules. In an unpublished opinion, we dismissed that portion of the appeal and struck the portion of their briefs pertaining to sanctions. After we dismissed that portion of the appeal, the Villars' attorneys obtained a Rule 58 judgment as to sanctions and filed a timely notice of appeal. The Villars' attorneys then moved us to consolidate the two appeals, rescind our order striking portions of their briefs, and adopt the briefs presently on file in this appeal. We granted these motions.

motion to remand for lack of complete diversity. The Villars contend that the district court should have considered the motion to remand first because it would have been simpler and more convenient to resolve the motion to remand.

According to the Villars, the motion to remand is simpler because, under the applicable standard of review, the district court need only determine whether there is a possibility the plaintiff could establish jurisdiction over the defendant. Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir.1983). The district court can usually make this decision without a full scale evidentiary hearing. Id. at 204 n. 2. The motion to dismiss, on the other hand, is more complicated because the district court will generally have to hold an evidentiary hearing in which the plaintiff must prove, by a preponderance

of the evidence, that the court has personal jurisdiction. CutCo Industries, Inc. v. Naughton, 806 F.2d 361, 364 (2d Cir.1986).[2] The Villars also contend that the principles of comity and federalism suggest that the district court should have considered the motion to remand first.[3]

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[2] This argument is somewhat misleading. Even the cases the Villars cite clearly recognize that district courts often decide motions to dismiss for lack of personal jurisdiction without an evidentiary hearing. Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir. 1985) ("When the district court decides the defendant's motion [to dismiss for lack of personal jurisdiction] without an evidentiary hearing, the plaintiff's burden is met by presenting a prima facie case for personal jurisdiction.")

[3] In support of their position, the Villars cite Allen v. Ferguson, 791 F.2d 611, 615 (7th Cir. 1986). In Allen, the Seventh Circuit held that the when a district court is faced with both a motion to remand and a motion to dismiss for lack of personal jurisdiction, the district court can only resolve the motion to dismiss first if it finds, that the plaintiff could not obtain personal jurisdiction over the defendant. Seventh Circuit cases, of course, are not binding

Unfortunately for the Villars, we have already rejected their primary argument. Walker v. Savell, 335 F.2d 536, 539 (5th Cir.1964). In Walker, we clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. As we noted, judicial economy favors this result because if the district court remands the proceeding, then the state court will probably have to decide the same motion to dismiss for lack of personal jurisdiction that the district court avoided. Furthermore, the district court must necessarily address the issue of personal jurisdiction regardless of

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in this circuit. Yet, even if we applied Allen, the district court still would have had the power to resolve the motion to dismiss first because the district court found that there was no possibility the Villars could obtain jurisdiction over the foreign defendants.

which motion it addressed first. The Villars' argument that the standard for determining personal jurisdiction will vary depending on which motion the district court decides first does not change the fact that the district court will still have to address the issue of in personam jurisdiction.

We recently reaffirmed our holding in Walker, which continues to be the law in this circuit. Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1066 (5th Cir.1992); see also Nolan v. Boeing Co., 736 F.Supp. 120, 122 (E.D.La.1990). Thus, we must reject the Villars' argument.

Even if we could overrule our holding in Walker and require the district court to rule on the Villars' motion to remand first, the Villars' argument would still fail because the district court did as the

Villars asked it to do: It applied the standard the Villars suggested and, alternatively, held that there was no possibility that the Villars could prove that the court had personal jurisdiction over the foreign defendants. The District court then denied the Villars' motion to remand because the Villars had fraudulently joined the non-diverse foreign corporations to defeat the district court's diversity jurisdiction.

B

The Villars also contend that the district court erred when it denied them additional discovery. The decision not to permit additional discovery "on a motion to dismiss for lack of personal jurisdiction is specifically one for the trial court's discretion, and '[s]uch discretion will not be disturbed ordinarily unless there are unusual

circumstances showing clear abuse.'" Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir.1982) (quoting Associated Metals & Minerals Corp. v. S.S. Geert Howaldt., 348 F.2d 457, 459 (5th Cir.1965).

The Villars wanted to engage in additional discovery so that they could find facts that would show that the foreign defendants were doing business in Texas and, thus, subject to personal jurisdiction in Texas. The Villars argue that they have never had an opportunity to do discovery on this issue. In support of their position, the Villars cite several cases in which we reversed a district court for failing to grant the plaintiff discovery on the issue of the defendants' amenability to the court' jurisdiction. See Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244 (5th Cir.1976).

The district court denied the Villars

additional discovery because the Villars had conducted extensive discovery during the two suits in California. The district court reasoned that the Villars' discovery on the forum non conveniens issues involved many of the same facts that the Villars were attempting to discover in the present suit. See Wood v. Santa Barbara Chamber of Commerce, 507 F.Supp. 1128 (D.Nev.1980). Finding that the Villars would not discover anything that they had not already learned in the first ten years of the litigation, the district court concluded that further discovery would serve only to vex and harass the defendants. Indeed, in the California suits the Villars were looking for any facts that might tie the defendants to the United States in general and California in particular. Thus, it is not surprising that the Villars inquired into the

defendants' ties to Texas during the earlier litigation.[4] Given the facts of this case, the district court clearly did not abuse its discretion when it curtailed discovery.

C

We will now turn to the Villars' argument that the district court erred when it decided not to remand the proceeding to the state court. The Villars contend that they presented sufficient evidence to prove that the district court could legitimately exercise jurisdiction over the foreign defendants. By proving that the district court had

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[4] In the Villars' prior discovery, they learned that CMC had an office in Texas, and the GTO used to have an office in Texas. Benton Musslewhite, the Villars' current attorney, conducted several depositions in California. Thus, he has personal knowledge of the Villars attempts to ascertain the defendants' ties to Texas.

personal jurisdiction over the foreign defendants, the Villars argue that they established that complete diversity did not exist. Without complete diversity, the district court would not have subject matter jurisdiction over the case, and, they argue, the district court would have had to remand the case to state court. The Villars are incorrect. The district court could not have exercised personal jurisdiction over the foreign defendants.

In a diversity case, a district court may exercise personal jurisdiction over a foreign defendant if the long arm statute of the state in which it sits allows the exercise of jurisdiction, and the exercise of jurisdiction is constitutional Rittenhouse v. Mabry, 832 F.2d 1380, 1382 (5th Cir.1987). Because the Texas long arm statute grants Texas courts the power to exercise jurisdiction whenever

constitutional, the sole question before the district court was whether the district court could constitutionally exercise jurisdiction over the foreign defendants. Aviles v. Kunkle, 978 F.2d 201, 204 (5th Cir.1992); Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex.1990).[5]

The Due Process Clause of the Constitution limits a court's power to exercise personal jurisdiction over a non-resident defendant to instances where the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe

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[5] The Texas long arm statute allows Texas courts to exercise jurisdiction over anyone that does business in Texas. Tex. Civ. Prac. & Rem. Code. Ann. §17.042 (Vernon 1986). This grant of jurisdiction is so broad that it extends as far as the constitution permits. Schlobohm v. Schapiro, 784 S.W.2d 355,357 (Tex.1990)

Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (internal cites omitted).

The minimum contacts the constitution requires depend on whether the court is asserting specific or general jurisdiction over the defendant. Specific jurisdiction exists when the defendant has purposefully directed his activities toward the forum and the plaintiff's injury relates to the defendant's contacts with the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Specific jurisdiction does not apply in this case because the Villars' injury does not relate to the defendants' contacts with Texas. General jurisdiction, on the other hand, applies when the forum has no direct interest in the underlying dispute, but it does have an interest in the defendant because the

defendant had continuing and systematic contacts with the forum. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). Thus, to establish general personal jurisdiction over the defendant, the plaintiff must prove that the defendant has more substantial contacts with the forum. Jones, 954 F.2d at 1068.

The Villars, however, do not even suggest that the foreign defendants have any direct contacts with Texas. Instead, the Villars argue that we can attribute CMC's contacts with Texas to the foreign defendants in order to satisfy the minimum contacts requirement.[6] Relying on the

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[6] The Villars also note that GTO had an office in Texas at the time of the accident. The Villars suggest that this contact with Texas should satisfy the constitution's minimum contacts requirement. The Villars argue that the defendants have not shown the GTO discontinued its Texas activities for

fact that CMC and the foreign defendants are related, the Villars contend that we should disregard the corporate fiction.[7] Texas law provides three broad theories under which a court may disregard the corporate fiction and pierce the corporate

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legitimate business reasons. This argument is frivolous. GTO ended its Texas activities long before the Villars instituted the instant suit and there is no reason to believe GTO ended the Texas contacts for an illegitimate reason.

[7] The Villars note that a court could constitutionally exercise personal jurisdiction over a subsidiary corporation if the subsidiary's parent had systematic contacts with the forum and the parent acted as an agent for the subsidiary. The Villars , thus, imply that CMC's Texas contacts satisfy the constitution's minimum contacts requirement because CMC was an agent fort the foreign corporations. This argument is without merit, and the Villars do not even include in their brief the standard for establishing an agency relationship under Texas law. Indeed, there are no facts in the record that suggest that CMC ever acted as an agent for the foreign corporations. In addition, the Villars do not appear to have raised this argument below because the district court did not address this argument in its opinion.

veil. We may pierce the corporate veil "when: 1) the corporation is the alter ego of its owners or shareholders, 2) the corporation is used for illegal purposes, and 3) the corporation is used as a sham to perpetrate a fraud." Fed. & Dep. Co. v. Commercial Cas Consultants, 976 F.2d 272, 274-275 (5th Cir.1992) (internal cites omitted). The purpose of all of these theories is to prevent the corporation's owners from using the "corporate entity as a cloak for fraud or illegality or to work an injustice." Id.[8]

The district court based its decision not to disregard the corporate fiction on

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[8] In their effort to disregard the corporate veil, the Villars rely on Castleberry v. Branscum, 721 S.W. 2d 270. 272 (Tex.1986), a case that was legislatively overruled four years ago. See Tex. Bus. Corp. Act Ann. (West Supp.1992); Fed. & Dep., 976 F.2d at 275; Farr v. Sun World Sav. Ass'n., 810 S.W.2d 294 (Tex. App.1991).

the following facts. Mr. Villar worked for SATOL, a Saudi Arabian corporation. At the time of the accident, GTO owned 60 percent of SATOL, and CMC owned one-third of GTO. Thus, CMC only owned, indirectly, 20 percent of SATOL. CMC did not dominate either GTO or SATOL, and CMC was connected with only two of SATOL's eight directors. On the contrary, SATOL's other shareholders had veto power over SATOL's activities because each owner controlled at least one of SATOL's directors, and SATOL could not act without the unanimous agreement of its board of directors. Moreover, SATOL had a separate existence from its shareholders and maintained its corporate formalities. The district court found no evidence of fraud, illegality, or injustice. We only review the district court's factual findings to ensure that they are not clearly erroneous.

Fed.R.Civ.P. 52(a).[9] The record fully supports these factual findings and, thus, we must affirm them.

Unfortunately for the Villars, the facts in the record do not support the Villars' attempt to disregard the corporate fiction on any theory that Texas recognizes. Indeed, the Texas courts and the Fifth Circuit have refused to disregard the corporate entity on facts

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[9] The Villars also complain that the district court disregarded John Runion's affidavit. The district court found that Runion's affidavit contained blatant misrepresentations and that it was wholly improper and untrustworthy. The district court further found that the Runion affidavit was strewn with unsupported legal conclusions despite the fact and Mr. Runion is not a lawyer. The Villars' argument misperceives our role as an appellate court. It was up to the district court to determine what weight to give Mr. Runion's affidavit. Fed. R. Civ. P. 52(a). Finding the affidavit untrustworthy, the district court gave the affidavit no weight at all. Because the district court's decision was not clearly erroneous, we will not disturb it.

that were much stronger than those the Villars rely on. See Dalton v. R & W Marine, Inc., 897 F.2d 1359 (5th Cir.1990); Hargrave v. Fiberboard Corp., 710 F.2d 1154 (5th Cir.1983); Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 374-76 (Tex.1984). Accordingly, the district court did not err when it refused to disregard the corporate fiction. As a result, we cannot attribute CMC's Texas contacts to the foreign defendants. Without CMC's Texas contacts, the foreign defendants did not have the minimum contacts with Texas that the constitution requires for the district court to exercise jurisdiction over the foreign defendants. Thus, we hold that the district court did not err when it dismissed the foreign defendants for lack

of personal jurisdiction.[10]

D

The Villars also contend that the district court should have remanded the proceeding to state court instead of dismissing their claims against CMC on grounds of forum non conveniens. In support of this argument, the Villars cite several cases that might suggest that the

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[10] Even assuming the foreign defendants had sufficient Texas contacts as argued by the Villars, the district court correctly dismissed the foreign defendants for lack of personal jurisdiction because the exercise of general personal jurisdiction over them would "offend traditional notions of fair play and substantial justice." International Shoes, 326 U.S. at 316, 66 S.Ct. at 158. It would simply be unfair to exercise personal jurisdiction over the foreign defendants when 1) Texas has no interest in this suit, 2) the dispute involves foreign law and foreign parties, and 3) it would be extremely burdensome for the foreign defendants to come to the United States to defend this suit. See Asahi Metal Ind. Co. v. Superior Ct. of Cal., Solano City, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1986).

district court had discretion to remand the case instead of dismissing it. See Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); Murray v. Union Pac. Ry. Co., 77 F.Supp. 613 (N.D.Ill.1948).

Even if the district court had discretion to remand the case, nothing in the record suggests that the district court abused its discretion. Furthermore, in a similar case, we found that the district court did not abuse its discretion when it dismissed the case instead of remanding it to state court.Nolan v. Boeing Co., 919 F.2d 1058, 1070 (5th Cir.1990). In Nolan, we reasoned that "[i]t would to anomalous to conclude that while a district court may properly invoke the federal law of forum non conveniens to decline jurisdiction over a properly removed case, it must

order the case to be reinstituted in an equally if not more inconvenient forum." Id. We agree. The district court did not abuse its discretion when it chose to dismiss the Villars' claims against CMC instead of remanding the proceeding.

E

We now turn to the Villars' argument that the district court erred when it dismissed their claims against CMC on grounds of forum non conveniens. The district court held that, because of the two dismissals on grounds of forum non conveniens in California, res judicata barred the Villars from arguing that the district court should not dismiss their suit on grounds of forum non conveniens. Alternatively, the district court examined the merits of CMC's motion and determined that it should dismiss the Villars' claims against CMC on grounds of forum non conve-

niens.

The Villars contend that the issue of forum non conveniens should not be res judicata because the two California courts applied federal forum non conveniens law, and because circumstances have changed since the first two dismissals. The Villars further contend that a forum non conveniens issue can never be res judicata because of the Supreme Court's opinion in Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 73, 84 S.Ct. 185, 187, 11 L.Ed.2d 137 (1963). In Parsons, the Supreme Court held that "a prior state court dismissal on the ground of forum non conveniens never can serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a)." Id.

The Villars' interpretation of the law is incorrect. Because the Parsons

case involved only a prior state court forum non conveniens dismissal, the case is not on point. We have already held that a plaintiff may not relitigate a forum non conveniens issue unless he can show some "objective facts that materially alter the considerations underlying the previous resolution." Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 314 (5th Cir.1987) (rev'd on other grounds 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988)). In the last ten years, the underlying facts have not materially changed. Thus, the prior decisions bar the Villars from relitigating this issue.

Furthermore, examining the merits of CMC's argument, we believe that the district court did not err when it granted the motion. We review a district court's decision to dismiss a case based on forum non conveniens to ensure that the district

court did not act unreasonably or arbitrarily. Nolan, 919 F.2d at 1068.

Contrary to the Villars' assertion, the district court properly applied federal forum non conveniens law when it addressed CMC's motion. Nolan, 919 F.2d at 1068 n. 11; In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir.1987) (en banc) (vacated on other grounds Pan Am World Airways, Inc. v. Lopez, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400, affirmed in relevant part 883 F.2d 17 (1989)). The factors a district court must consider before dismissing a case based on forum non conveniens have not changed since the Ninth Circuit dismissed the Villars' case. Villar, 782 F.2d at 1482-1483. The Ninth Circuit correctly concluded that the Villars' case should be dismissed based on forum non conveniens. The Ninth Circuit found that

no forum in the United States was convenient. We agree. If anything, Texas is less convenient than California because CMC has its headquarters in California and not Texas. We, therefore, conclude that the district court did not act unreasonably or arbitrarily when it dismissed the Villars' claims against CMC on grounds of forum non conveniens.

F

We now address the Villars' contention that the district court erred in enjoining them from filing another suit in the United States. We review the district court's decision to grant an injunction for an abuse of discretion. United States v. Paradise, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). The Villars rely on the Supreme Court's holding in Chick Kam Choo that, pursuant to the Anti-Injunction Act, we cannot

enjoin an ongoing state court proceeding. See 28 U.S.C. § 2283. Yet, Chick Kam Choo is not on point because there is no ongoing state court proceeding in this case.

On the contrary, as long as the federal court acts before the plaintiff has commenced the state court proceeding, a federal court can enjoin a state court. See Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2, 85 S.Ct. 1116, 1119 n. 2, 14 L.Ed.2d 22 (1965) ("This statute [the anti-injunction act] and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted."); Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 842 n. 6 (1st Cir.1988) ("The Anti-injunction Act does not, in any event, bar injunctive relief that would run against a state court--as

in effect, would the relief ordered here--when the federal court's injunctive power is invoked (i.e., requested) by the plaintiff before the state court action is commenced.") (internal cited omitted).

Similarly, federal courts have the power to enjoin plaintiffs who abuse the court system and harass their opponents. Indeed, federal courts have broad powers to protect their judgments and the integrity of the courts as a whole. In re Martin-Trigona, 737 F.2d 1254, 1262 (2d Cir.1984). In one case, we held that the district court had the power to enjoin "any future litigation on any cause of action arising from the fact situation at issue in [the] case." Harrelson v. United States, 613 F.2d 114, 116 (5th Cir.1980). In another case, the C.C. Circuit permanently enjoined a civil litigant from filing an action in any federal court

without prior permission of the court. Urban v. United Nations, 768 F.2d 1497, 1500 (D.C.Cir.1985). Other courts have reached the similar conclusions. See Castro v. United States, 775 F.2d 399, 408-409 (1st Cir.1985) (plaintiff enjoined from filing additional pleadings and from relitigating any matter set forth in the case); Ruderer v. United States, 462 F.2d 897 (8th Cir.1972).

In the case before us, the district court found that further litigation in the United States could serve no purpose other than to vex and harass the defendants. The district court explicitly found, like the Ninth Circuit before it, that no court in the United States would be convenient. The record fully supports these findings. Federal courts have repeatedly urged the Villars' to sue in the Philippines. Nonetheless, the Villars continue to bring

these frivolous suits in the United States. The Villars seem determined to pursue this abusive litigation in federal courts until ordered to stop. Under these circumstances, it was appropriate for the district court to enjoin the Villars from bringing any future litigation based on the underlying facts in this case, including future litigation in state courts.

G

Finally, we consider whether the district court erred when it sanctioned the Villars' attorneys for making unreasonable arguments and for failing to make a reasonable inquiry into the facts.[11] We review the district court's Rule 11 sanctions to determine whether the

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[11] On appeal, the Villars' attorneys devote only one paragraph of their brief to the issue of sanctions and they do not contest the amount of the sanctions.

district court abused its discretion. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); Thomas v. Capital Sec. Serv. Inc., 836 F.2d 866 (5th Cir.1988) (en banc). The district court found that the Villars' attorneys asserted illogical, unreasonable arguments and miscited case law.

We hold that the district court did not abuse its discretion when it sanctioned the Villars' attorneys. The Villars' attorneys made numerous frivolous arguments before the district court; indeed, they continued to assert several of these arguments on appeal. In the district court they argued that the alien defendants are subject to personal jurisdiction in Texas because they were the "alter ego" of CMC. The facts in this case do not remotely support this contention. To bolster their alter ego

argument, they relied on Castleberry, 721 S.W.2d at 270, despite the fact that this case had been legislatively overruled four years earlier. See footnote 8, supra. The Villars' attorneys also argued that the district court should ignore our holding in Walker, 335 F.2d at 536, even though we recently had reaffirmed that decision. Similarly, they argued that the district court should apply state forum non conveniens law notwithstanding our recent decisions clearly to the contrary in In re Crash Disaster, 821 F.2d at 1147, and Nolan, 919 F.2d at 1068.

In addition, the Villars' attorneys relied heavily on the Runion affidavit even though it contained blatant misrepresentations. The district court concluded that:

> As noted above, the Runion affidavit, besides being wholly improper and unsatisfactory,

> contains blatant misrepresentations of deposition testimony. At the very best, Plaintiffs' counsel has relied on an easily discoverable falsehood and that should have been discovered in the exercise of reasonable care and diligence. At worst, Plaintiffs' counsel has conspired with Mr. Runion in a deliberate attempt to mislead the court.

This factual finding is not clearly erroneous and, thus, we must accept it. This factual finding alone fully supports the district court's sanctions because, pursuant to Rule 11, an attorney must make a reasonable inquiry into the facts before submitting a document to the court. See Thomas, 836 F.2d at 873-74 (We held that attorneys have an affirmative obligation to conduct "a reasonable inquiry into the facts which support the document.")

IV

For all of the foregoing reasons, we AFFIRM the decision of the district court.

AFFIRMED.

JOHNSON, Circuit Judge, concurring in part, dissenting in part:

This writer concurs in part III-A of the majority's opinion. However, in my view, the Court should remand this case for the allowance of discovery on the jurisdiction and forum non conveniens issues. By failing to reverse and remand, the majority--without explanation or authority[1]--reverses well-settled and well-reasoned Fifth Circuit law. This dissent is therefore tendered.

The majority opinion states that

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[1] This Court has consistently adhered to the policy that a panel may not overrule a prior panel's decision, unless an intervening en banc or Supreme Court decision specifically or practically overruled the earlier opinion. Umphlet v. Connick, 815 F.2d 1061, 1063 (5th Cir. 1987). Here, the majority attempts to overrule, not only past Fifth Circuit panel decisions, but also a Fifth Circuit en banc decision.

"[t]he Villars also contend that the district court erred when it denied them additional discovery." Villar, supra at ---- (emphasis added). However, the record, the briefs, the district court's opinion and counsel for the parties, themselves, all acknowledge that there has been absolutely no discovery in the case sub judice. While it is true that the parties engaged in discovery with respect to a forum non conveniens issue ten years ago in a California case, it is quite elementary that personal jurisdiction analysis and forum non conveniens analysis are completely different.

Evaluating personal jurisdiction in Texas requires courts to review the relationship between the defendant and the forum state to determine whether sufficient purposeful contacts exist and to ensure that traditional notions of

"fair play and substantial justice" would not be offended by haling [sic] the defendant into court. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 109, 113, 107 S.Ct. 1026, 1030-31, 1033, 94 L.Ed.2d 92 (1987); Command-Aire Corp. v. Ontario Mechanical Sales and Service Incorporated, 963 F.2d 90, 94 (5th Cir.1992).

However, in forum non conveniens cases, courts do not look at contacts between the defendant and the state. The ultimate inquiry in forum non conveniens cases is convenience--not minimum contacts and not fair play and substantial justice. Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 527, 67 S.Ct. 828, 833, 91 L.Ed. 1067 (1947); Command-Aire, 963 F.2d at 95; In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1163 (5th

Cir.1987) (en banc). With respect to forum non conveniens issues, courts are to first determine whether a more convenient forum exists. If such a forum is available, courts are then, and only then, to balance private interests with public interests.[2] Piper Aircraft Co. v. Reyno,

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[2] In analyzing the private interests courts are to consider: 1) the parties' access to sources of proof, 2) the availability of compulsory process for obtaining the attendance of unwilling witnesses, 3) the costs of obtaining the attendance of willing witnesses, 4) the ability to view the premises, if necessary, and 5) the existence of other expeditious and inexpensive judicial review of the case. Courts should also determine whether judgment, if entered, would be enforceable. In re Air Crash Disaster, 821 F.2d at 1162 (quoting Gulf Oil Corp v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1957).

In analyzing the public interests, courts are to consider 1) the administrative problems which flow from court congestion, 2) the interest in having localized controversies resolved at home, 3) the interest in having a court which is familiar with the applicable law to handle the case, and 4) the unfairness in burdening citizens with jury duty in a

454 U.S. 235, 255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981); Command-Aire, 963 F.2d at 95.

Based upon the factors considered in personal jurisdiction and forum non conveniens analyses, it should be patently clear that discovery on one issue is not tantamount to discovery on the other. Indeed, the United States Supreme Court acknowledged in its seminal forum non conveniens opinion, Gulf Oil Corp. v. Gilbert, that forum non conveniens issues arise when courts, which actually have jurisdiction over the parties, find that exercising that jurisdiction would cause substantial inconvenience. 330 U.S. at

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case which is unrelated to the forum. Courts should also consider whether conflicts of law issues will arise and whether foreign law applies. In re Air Crash Disaster, 821 F.2d at 1162-63 (quoting Gulf Oil Corp., 330 U.S. at 508-09, 67 S.Ct. at 843).

507, 67 S.Ct. at 842 ("a court may resist imposition upon its jurisdiction even when jurisdiction is authorized"). Thus, even if the discovery conducted by the Villars were recent--and there surely can be no question but that ten-year-old discovery is, in no way, recent--the Villars were denied jurisdictional discovery. It is now beyond dispute that discovery may be used for jurisdictional purposes.[3]

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[3] In Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, the United States Supreme Court determined that discovery into jurisdictional matters is so important that a defendant's failure to comply therewith allows the district court to sanction the defendant by assuming that personal jurisdiction exists. 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed. 2d 492 (1982). The Court explained:

> Having put the issue [of personal jurisdiction] in question, petitioners did not have the option of blocking the reasonable attempt of CBG [the plaintiff] to meet its burden of proof.... Because of petitioners' [the defendants'] failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners and

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n. 13, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978).

This Court has often dealt with jurisdictional discovery, and until today, Fifth Circuit law was well-settled that when a diligent plaintiff presented a non-frivolous claim of jurisdiction and requested jurisdictional discovery, the district court was required to allow that discovery.[4] Blanco v. Carigulf Lines, 632

Pennsylvania, the critical issue in proving personal jurisdiction. Id. at 709, 102 S.Ct. at 2107

[4] This Court has upheld the dismissal of cases on jurisdictional grounds when there has been no discovery only when the plaintiff had opportunities to engage in jurisdictional discovery but chose not to fully avail himself of that opportunity, Singletary v. B.R.X., Inc., 828 F.2d 1135, 1137-38 (5th Cir. 1987), or when the plaintiffs' jurisdictional claims were frivolous. Wyatt v. Kaplan, 686 F.2d 276, 284 (5th Cir. 1982); Washington v. Norton Manufacturing, Inc., 588 F.2d 441, 445 (5th Cir. 1979).

F.2d 656, 657 (5th Cir.1980) (asserting that "[t]his court has held that where the record left in doubt questions upon which jurisdiction could be based plaintiff . . . had the right to employ interrogatories to develop fully the necessary facts"); Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244, 1248-49 (5th Cir.1976) (After the plaintiffs had propounded and received responses to 184 interrogatories and after the plaintiffs had had eight months in which to engage in discovery, this Court still held "that the district court acted too drastically in entering its order of dismissal without giving the plaintiff a further opportunity for discovery."); Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146 (5th Cir.) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973) (reversing the denial of jurisdictional discovery even though

the plaintiff had agreed in writing that discovery would not take place until after the district court ruled on the defendants' motions to dismiss); Davis v. Asano Bussan Co., 212 F.2d 558, 564-65 (5th Cir.1954) (holding that "[t]he plaintiff was not required to rely exclusively on affidavits furnished by the defendants for answer to that question [of personal jurisdiction], but had a right to employ interrogatories to develop [the jurisdictional question] fully" and asserting that "the district court . . . should have received the complete information called for by the interrogatories before entering final judgment" (emphasis added)). See Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981) (deciding, "It is true that the factual

determinations decisive of a motion to dismiss for lack of jurisdiction are within the court's power . . . . But still the district court must give the plaintiff an opportunity for discovery and for a hearing" (emphasis added)); Chatham Condominium Associations v. Century Village, Inc., 597 F.2d 1002, 1012 (5th Cir.1979) (deciding that "dismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery, should be granted sparingly"); see also Singletary, 828 F.2d at 1137 (stating that "[i]n an appropriate case, we will not hesitate to reverse a dismissal for lack of personal jurisdiction, on the ground that the plaintiff was improperly denied discovery" (quoting Wyatt, 686 F.2d at 283)).

The Fifth Circuit is not the only

court which has determined that diligent plaintiffs who present non-frivolous claims of jurisdiction have a right to engage in jurisdictional discovery. Such is the rule, not only in other federal circuit courts, but also in a number of state courts.[5]

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[5] Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1st Cir.1992); Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 425 (D.C.Cir.1991); Crane v. Carr, 814 F.2d 758 (D.C.Cir.1987); Eaton v. Dorchester Development, Inc., 692 F.2d 727, 729 (11th Cir.1982); Wells Fargo Express Co., 556 F.2d 406, 431 n.24 (9th Cir. 1977); Lekkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir.1971); Fraley v. Chesapeake and Ohio Ry Co., 397 F.2d 1,3 (3d Cir.1968); Surpitski v. Hughes-Keenan Corp., 362 F.2d 254, 255 (1st Cir.1966); Gleneagle Ship Management Co. v. Leondakos, 602 So.2d 1282, 1284 (Fla.1992); Hart Holding Co. v. Drexel Burnham Lambert Inc., 593 A.2d 535, 540 (Del. Ch.1991); Amigo Foods Corp. v. Marine Midland Bank-New York, 39 N.Y.2d 391, 384 N.Y.S.2d 124, 126-127, 348 N.E.2d 581, 583 (1976); Peterson v. Sparton Industries, Inc., 33 N.Y.2d 463, 354 N.Y.S.2d 905, 908 and n. 2, 310 N.E.2d 513, 515 and n. 2 (1974); see also 4 James W. Moore et al, Moore's Federal Practice ¶ 26.56 [6] (2d ed. 1991) (relating that

In this case, the question of jurisdiction was altogether unclear. The district court acknowledged that GTO, an alien defendant, once maintained an office in Texas and that vessels owned by one or more of the alien defendants pass through Texas ports. However, the court went on to determine that since the record showed nothing more, it would dismiss all of the claims against the alien defendants for lack of personal jurisdiction. However, a patent flaw exists in the district court's, and therefore the majority's, logic: The record showed no other jurisdictional facts because the district court prohibited the Villars from engaging in jurisdictional discovery.

"[i]n cases which jurisdiction depends upon complicated facts, however, it has been held that it is error to grant a motion to dismiss without affording the plaintiff an opportunity for discovery").

This flaw also exists in the district court's and the majority's forum non conveniens analysis. The majority correctly states that a prior forum non conveniens determination precludes a later forum non conveniens determination unless the plaintiff can point to facts which changed materially after the initial determination. See Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 314 (5th Cir.1987), rev'd on other grounds, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). The majority also states that "[i]n the last ten years, the underlying facts have not materially changed." Villar, supra at 1498. However, this Court actually does not know whether the facts have changed materially. It is true that the record reveals no such changes, but it is also true that, again, the plaintiffs were prevented from making such

a showing because the district court precluded any and all discovery in this case. Nevertheless, the majority holds that the plaintiffs' failure to do that which the district court prevented them from doing--finding and pointing out jurisdiction and forum non conveniens facts--is their ultimate downfall.

In my view, the majority's holding countenances the resolution of contested jurisdiction questions based upon conjecture, not fact. Justice Holmes, writing for the Supreme Court, advised that when courts determine whether personal jurisdiction exists, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 343-44, 61 L.Ed. 608 (1917) (emphasis added). Nevertheless, the

majority has thrown "caution," along with well-settled Fifth Circuit law, to the wind. As this Court properly announced almost forty years ago, "[t]he clearing of court dockets is one of the desiderata in the judicial function. But it should not be allowed to become a fetish for it does not rank with the raison d'etre of courts[]---the administration of justice based upon a full and fair disclosure of the facts." Slagle v. United States, 228 F.2d 673, 679 (5th Cir.1956) (emphasis added).

Today, the majority ignores Slagle and a host of other Fifth Circuit precedent. I, therefore, respectfully dissent.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7162

NENITA S. VILLAR, etc., ET AL.,
Plaintiffs-Appellants,
versus
CROWLEY MARITIME CORPORATION, ET AL.,
Defendants-Appellees.

No. 93-7036

NENITA S. VILLAR, etc., ET AL.,
Plaintiffs,
GARY REIBSCHLAGER and BENTON MUSSLEWHITE
Appellants,
versus
CROWLEY MARITIME CORPORATION, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 5-25-93, 5 Cir., 1993, _____ F.2d _____)

(JUNE 30, 1993)

Before JOHNSON, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and

a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ E. GRADY JOLLY

United States
Circuit Judge

CLERKS NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CAUSE NO. H-91-0743

NENITA S. VILLAR, Individually, and as Personal Representative of Renerio Z. Villar, Deceased, Josephine Villar, Gerardo Villar, Reynaldo Villar and Renerio Villar, Jr.

Plaintiffs,

VS.

CROWLEY MARITIME CORPORATION, ET AL

Defendants.

NOTICE OF FILING OF NOTICE OF REMOVAL

AND BOND FOR REMOVAL

TO: Mr. Gary M. Riebschlager, O'Quinn, Kerensky & McAninch, 2300 Lyric Centre Building, 440 Louisiana, Houston, Texas 77002

Please take notice that Crowley

Maritime Corporation, defendant in the above entitled action, has on the 22 day of March, 1991, filed its Notice of Removal and Bond for Removal, copies of which are attached hereto, in the Office of the Clerk of the United States District Court for the Southern District of Texas, Houston Division, at Houston, Texas.

You are also advised that defendant Crowley Maritime Corporation, upon the filing of said Notice of Removal and Bond for Removal, filed a copy of same with the Clerk of the 295th Judicial District Court of Harris County, Texas, in accordance with 28 U.S.C. § 1446.

Respectfully submitted,

By:_____

Jack L. Allbritton
State Bar No. 01014000
1301 Mckinney, Suite 5100
Houston, Texas 77010-3095

Telephone: 713/651-5151

Telecopier: 713/651-5246

Attorney-in-Charge for
Defendant, Crowley Maritime
Corporation

OF COUNSEL:
FULBRIGHT & JAWORSKI

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on counsel for plaintiffs, Mr. Gary M. Riebschlager, Messrs. O'Quinn, Kerensky & McAninch, 2300 Lyric Centre Building, 440 Louisiana, Houston, Texas 77002, by certified mail, return receipt requested, this 22 day of March, 1991.

Jack L. Allbritton

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CAUSE NO. H-91-0743

NENITA S. VILLAR, Individually, and as Personal Representative of Renerio Z. Villar, Deceased, Josephine Villar, Gerardo Villar, Reynaldo Villar and Renerio Villar, Jr.

Plaintiffs,

VS.

CROWLEY MARITIME CORPORATION,

ET AL

Defendants.

NOTICE OF REMOVAL

Crowley Maritime Corporation, a defendant, files this Notice of Removal to remove the suit brought by plaintiffs in the Harris County District Court, 295th Judicial District, to the United States

District Court for the Southern District of Texas, Houston Division. Joining in this removal, but subject to and without waiving any defenses, including lack of personal jurisdiction and improper service, are named co-defendants, Crowley Maritime International, S.A., Genstar Limited, k.n.a. Genstar Corporation, Ross Insurance Limited, successor to Genstar Overseas, Limited, Fednav Limited, successor to Federal Commerce & Navigation, Federal Pacific Limited, Saudia Arabian Transport Organization Limited, and GTO Corporation, k.n.a. WTO Corp., (all of whom are hereafter collectively referred to as "co-defendants".

The grounds for removal are:

1. Plaintiffs are Philippine citizens who brought a wrongful death action for damages arising from the death

of Renerio Z. Villar in March, 1977 in Saudia Arabia. After identical suits filed in the United States District Court, Northern District of California and the California state court were dismissed on grounds of forum non conveniens, and affirmed in both the Ninth Circuit and the California Court of Appeals, plaintiffs filed suit on February 14, 1991 in the District Court of Harris County, Texas, 295th Judicial District, being Cause No. 91-006265 (copy of Plaintiffs' Original Petition attached as Ex. A.).

2. Plaintiffs seek damages in excess of the $50,000 jurisdiction limit of this court.

3. There exists complete diversity of citizenship between plaintiffs, citizens of the Philippines [sic], and defendant Crowley Maritime Corporation, a Delaware corporation whose principal place

of business is in California. Accordingly, this court has jurisdiction under 28 U.S.C. § 1332(a)(2).

4. Co-defendants joining in this removal have not yet been served, although plaintiffs have attempted service on them by serving the Secretary of State of Texas on March 14, 1991. All of the co-defendants are alien corporations or companies, who have been fraudulently named as defendants in an attempt to defeat or destroy diversity jurisdiction. None of the co-defendants are present in Texas, have a registered agent for process in Texas, do business in Texas, or have the necessary minimum contacts with Texas to satisfy constitutional due process and fairness standards necessary to subject them to jurisdiction in Texas in connection with this controversy. There is no possibility that personal

jurisdiction can be sustained over these co-defendants in this matter, which arose out of the death of plaintiffs' decedent in Saudia Arabia.

Accordingly, the citizenship or alienage of co-defendants does not destroy diversity, nor affect Crowley Maritime Corporation's right of removal.

5. Crowley Maritime Corporation was served with citation by serving its registered agent, CT Corporation System, on March 4, 1991 (see Ex. B, copy of executed process). This Notice of Removal has been filed within thirty (30) days of service. Executed process on co-defendants has not yet been returned, although service has been attempted on co-defendants by service on the Secretary of State on March 4, 1991.

6. Crowley Maritime Corporation also has filed a Bond on Removal of good

and sufficient surety, conditional as provided by 28 U.S.C. § 1446(d), that it will pay all costs and disbursements incurred by reason of removal proceedings should it be determined that this case was not removable or was improperly removed.

7. Written notice of filing of this Notice of Removal and the accompanying bond are being given to plaintiff promptly after the filing of this Notice, as is required by law.

8. A true and correct copy of this Notice of Removal is promptly being filed with the Clerk of the 295th Judicial District Court of Harris County, Texas, as is required by law.

9. Attached to this Notice, and by reference made a part hereof, are true and correct copies of all executed process, the petition, and the docket sheet, there being no orders entered by the state court

in the aforesaid action.

WHEREFORE, Defendant Crowley Maritime Corporation prays that this court will enter such further orders and grant such further relief as may be necessary to secure removal herein, and prevent further proceedings in said District Court of Harris County, Texas, and for such other relief as defendant is justly entitled to receive.

Respectfully submitted,

By:_____
Jack L. Allbritton

State Bar No. 01014000

1301 Mckinney, Suite 5100

Houston, Texas 77010-3095

Telephone: 713/651-5151

Telecopier: 713/651-5246

Attorney-in-Charge for

Defendant, Crowley Maritime

Corporation

and

Co-defendants joining herein, Crowley Maritime International, S.A., Genstar Limited, k.n.a. Genstar Corporation, Ross Insurance Limited, successor to Genstar Overseas, Limited, Fednav Limited, successor to Federal Commerce and Navigation, Ltd., Federal Pacific Limited, Saudia Arabian Transport Organization Limited, and GTO Corporation, k.n.a. WTO Corporation

OF COUNSEL:

FULBRIGHT & JAWORSKI

THE STATE OF TEXAS §

COUNTY OF HARRIS §

There personally appeared before me, an officer authorized by law to administer oaths, the undersigned, Jack L. Allbritton, who deposed and says on oath that he is the attorney for Defendant Crowley Maritime Corporation in the above proceeding, that he has personal knowledge of all matters contained in the Notice of Removal, and that the allegations contained in the Notice of Removal are true and correct.

_____

Jack L. Allbritton

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by Jack L. Allbritton, this 22 day of March, 1991, to certify which witness my hand and seal of office.

SEAL

_____

Notary Public in and for

The State of Texas

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on counsel for plaintiffs, Mr. Gary M. Riebschlager, Messrs. O'Quinn, Kerensky & McAninch, 2300 Lyric Centre Building, 440 Louisiana, Houston, Texas 77002, by certified mail, return receipt requested, this 22 day of March, 1991.

_____

Jack L. Allbritton

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CAUSE NO. H-91-0743

NENITA S. VILLAR, Individually and as Personal Representative of Renerio Z. Villar, Deceased Josephine Villar, Gerardo Villar, Reynaldo Villar, and Renerio Villar, Jr.

VS.

CROWLEY MARITIME CORPORATION, ET AL

AFFIDAVIT OF JOHN RUNION

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority on this day personally appeared JOHN RUNION, who being first duly sworn did depose and say:

1. I am personally familiar with the facts stated herein and if sworn

as a witness I could competently testify thereto.

2. I am presently an independent consultant, temporarily employed by Sovereign Energy, Inc. in the capacity of Technical Consultant Business Development. I have been employed by Sovereign Energy, Inc. as an independent consultant since 1987.

3. The attached Curriculum Vitae outlines s [sic] chronological synopsis of my multi-discipline, domestic U.S.A. and International Professional Business experience from 1965 through the present time frame. My CV is attached hereto as Exhibit A.

4. Beginning in September of 1990 I was a fact/expert witness in the Grunke/Cole, et al vs. Atlantic Richfield Co., Brinkerhoff Maritime

Drilling Corp., Crowley Maritime Corp., et al; Cause No. 83-32768 in the 157th Judicial District Court of Harris County, Texas.

a. Through personal fact knowledge and research of deposition testimony, affidavits, answers to interrogatories, review of discovery documents related to this particular cause an alter-ego and modus operandi; opinion(s) - were derived and expounded by me in sworn testimony. Through my work in the Grunke/Cole cases, I became fully familiar with the overall operation of the parent, Crowley Maritime Corporation ("CMC") and its general relationship with all of its subsidiaries and affiliate companies around the

world.

b. I concluded from all the evidence that a strong centralized parent company modus operandi existed between CMC-parent; directors and officers and in between alter-ego affiliate and subsidiary companies. The modus operandi included Crowley Maritime Corp., S.A., Brinkerhoff Maritime Drilling Corp. and Crowley Maritime Drilling PTE. Ltd.. I was able to easily conclude that Crowley Maritime Corporation exerted extensive dominion and control over subsidiary and affiliate companies as their alter ego and defacto employers of directors, officers and employees of these subsidiary

companies.

c. It was a concluded fact that Crowley Maritime Corporation (alter ego of Brinkerhoff and other Crowley Affiliates) was doing continuous and substantial business in Texas.

d. Attached hereto as Exhibit B is the Order of holding of the Court that Crowley Maritime Corporation was for the purposes of in personam jurisdiction, the alter ego of the Brinkerhoff subsidiaries, sufficient so that the Texas district court in that case found that it had in personam jurisdiction over the Brinkerhoff subsidiaries (who, like many of the foreign subsidiaries in this case, had no office or agent for service

in Texas).

5. In turn, I have again been retained by O'Quinn, Kerensky & McAninch and personally have perused and researched the following twenty five (25) relevant information documents:

a. Deposition documents re: John M. Maguire, Director of Administration and controller of Crowley Maritime Corporation International Division taken September 10, 1981. (Attached as Exhibit C);

b. Deposition and documents re: George A. Watkins, Vice President, Marketing of Crowley Maritime Corporation taken June 11, 1982. (Attached as Exhibit D) (Deputy Managing Director of GTO; Leo Collar was Managing

Director of GTO)

c. Deposition and documents re: William D. McLean, Senior Vice President of Marine Operations of Crowley Maritime Corporation taken on June 11, 1982. (Attached as Exhibit E) (General Manager and managing Director of SATOL)

d. Deposition and documents of Rodolfo Nazareth Financial Controller and Representative of PAC International, S.A. (Singapore) taken August 5, 1982. (Attached as Exhibit F)

e. Castleberry v. Branscum, et al; July 2, 1986. No. C-4536 Supreme Court of Texas; January 14, 1987.

f. Corporations - Legal Definitions and Briefs

§13-Alter ego Doctrine- 15 Tex.Jur. 3rd - pages 159-168

§14-Affiliated or Subsidiary Corporations

§15-Corporation as Person

§12-13. Corporations - 15 Tex.Jur.3d Supp. - pages 12 & 13

§51-Courts Constitutional Limitations; Minimum contacts - 16 Tex. Jur.3d Supp. - pages 40 & 41

§47. In General Jurisdiction over Persons - pages 306-315

§48 Long-Arm Statute - 16 Tex. Jur.3d

§49 Doing Business in State; 528 S.W.2d 571; Gentry v. Credit Plan Corp of Houston; pages 570-577

Helicopteros Nacionales de Colombia S.A. v. Hall; 104 S.Ct.

(No. 82-1127 dated November 8, 1983 - April 24, 1984) - pages 1868-1879

Note: (g-y) In Reference to No. C-80-D556 RHS/California

g. Answers to First Set of Interrogatories Propounded by Plaintiffs dated December 22, 1980 [sic]

h. Answers to Second Set of Interrogatories Propounded by Plaintiffs dated December 24, 1980.

i. Answers to Interrogatories Set No. One dated February 17, 1981.

j. Answer to First Amended Complaint for Personal Injury and Wrongful Death dated November 2, 1981.

k. Answers to Interrogatories

dated March 23, 1982.

l. Notice of Motion for Summary Judgment dated May 21, 1982.

m. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and Defendants' Motion to Dismiss dated May 21, 1982.

n. Plaintiffs' Supplemental Memorandum of Points and Authorities (of 13 above) dated September 14, 1982.

o. Defendant's Memorandum in Opposition to Plaintiffs' Motion to Vacate Docket Notation dated November 12, 1982 [sic]

p. Plaintiffs' Motion to Vacate Docket Notation, For Reconsideration and for Denial

of Defendants' Motion for Summary Judgment and to Dismiss dated November 12, 1982.

q. Dismissal of Civil Action - Order by District Judge - Robert H. Schnacke dated November 26, 1982.

r. Case No. 855933; Villar vs. Crowley, et al, Memorandum in Support of Motion to Dismiss dated April 10, 1989.

s. United States Court of Appeals for the Ninth Circuit Case No. 82-4710; Villar vs. Crowley et al (certifications and exhibits) dated May 9, 1983.

t. Case No. 855933 Plaintiffs Preliminary Response to Defendants' Motion to Dismiss on Ground of Forum non [sic] Conveniens and Plaintiffs'

Motion for Deferral Pending Resolution of Appeal in Zipfel and/or for six months pending discovery dated April, 1989.

u. Affidavits of Rex M. Clack dated April 21, 1982 and May 14, 1982.

v. Affidavits of John M. Maguire dated June 22, 1981 and May 12, 1982.

w. Affidavit of Robert L. Leggett re: Saudi Arabian and Philippines Maritime Injury Laws dated April 30, 1985.

x. Affidavit of Rodrick MacKinnon dated April 8, 1991.

y. Affidavit of M.E. Chlumecky dated April 8, 1991.

6. Previously sworn deposition testimony and affidavits attest to the fact(s) that at the relevant

times the following facts were or are true: a) Crowley Maritime Corporation (CMC) was incorporated under the laws of the state of Delaware, had its principal place of business at One Market Plaza, San Francisco, California, and also had an office in Houston, Texas. CMC filed a certificate of authority to do business in Texas on January 2, 1973 and is currently in good standing through April 30, 1992 (Derived from Secretary of State - Texas Comptroller Public Accounts on 4/18/91). CMC has an agent for service as well as an office in the state of Texas; b) CMC owned all of the stock of Crowley Maritime International S.A. (CMI, S.A.) and was in control and exercising almost total dominion over operations; c)

CMC parent, and CMI, S.A. shared the exact officers and directors (Macguire deposition of 9/10/81) Exhibit G (the excerpts of the deposition of Maguire and the documents to his deposition are attached as Exhibit C); d) there are four (4) main companies which are the alter egos of each other: 1) Crowley Maritime Corporation (CMC); 2. Crowley Maritime International, S.A. (CMI); (GTO) - Global Transport Organisation [sic], Inc.; and 4. (SATOL); Saudi Arabia Transport Organisation [sic], Ltd.; e) GTO Corporation was incorporated under the laws of Liberia, had its principal place of business at One Market Plaza, San Francisco, California, and it also had an office in Houston, Texas. The State of

Texas Secretary of State denotes that GTO-Foreign Corporation had authority to do Business in Texas from 1970 to October 13, 1978 when it was dissolved. The shareholders of GTO and the respective shares owned by each were: CMI (33 1/3%, Genstar Overseas Ltd. (33 1/3%) and Federal Pacific, Ltd. (33 1/3%). GTO owned 60% of the stock of SATOL and the directors and officers were the exact same as parent CMC and alter ego CMI, S.A.; f) CMI, S.A. was incorporated under the laws of Panama and had its principal place of business at One Market Plaza, san [sic] Francisco, California. CMI owned 33 1/3% of the stock of GTO Corporation and shared the same directors and officers as its parent Crowley Maritime Corp.; g) Genstar Limited was incorporated

under the laws of Canada with its principal place of business in Montreal, Canada. Genstar owned 100% of the stock of Genstar Overseas Ltd.; h) Genstar Overseas Limited was incorporated under the laws of Bermuda with its Principal place of Business in Hamilton, Bermuda; i) Saudi Arabia Transport Orgarisation [sic] Limited (SATOL) was incorporated under the laws of Saudi Arabia and had its principal place of business in Dammam, Saudi Arabia with offices at One Market Plaza, san [sic] Francisco California as well. The shareholders of SATOL and the respective share owned by each were: Yusuf Bin Ahmed Kanoo, a Saudi Arabia Corporation (40%) and GTO (60%). The Directors of SATOL (no officers elected) were from Alter ego

corporations and totaled nine (9) (Maguire deposition taken 9/10/81; j) Federal Commerce and Navigation (Federal) was incorporated under the laws of Canada with is principal place of business in Montreal, Canada (Federal) owned all of the stock of Federal Pacific Limited; k) Federal Pacific Limited (FedPac) was incorporated under the laws of Bermuda with its principal place of business in Hamilton, Bermuda.

7. After the death of Plaintiff Renerio Z. Villar, the above stated facts in 6-a through K on February 27, 1980 were true with these exceptions:

a. GTO had changed its name to WTO corporation;

b. CMI became the 100% owner of the shares of WTO

corporation; taking over all of the stock owned by Genstar and Fedpac; the assets and ownership of GTO were, after the Plaintiffs filed suit in the California federal court, transferred to WTO/CMI/CMC, in resulting fraud of the rights of the plaintiffs.

c. The Tug "Bannock" was under bare boat charter to WTO corporation;

d. After the accident involving Villar, SATOL was not engaged in the business of marine lighterage. SATOL was engaged only in land transportation services, ceasing its business of marine lighterage services shortly after the death of Villar on

September 30, 1979. After the Villars filed suit in California SATOL was eventually liquidated and most of its assets apparently transferred to CMC and its affiliates, agencies resulting in fraud of the rights of Plaintiffs.

8. Most of the day to day managers, officers and directors of SATOL were paid by CMC and GTO affiliates, in order to assure continuity of retirement and other benefits when such persons returned to each respective parent company. These persons, together with other managers paid directly by SATOL were under the direct control of Crowley Maritime Corporation - parent of CMI, S.A. It is important to note that the CMC/GTO employees <u>controlled</u> and dominated

SATOL generally and on a day to day basis.

9. At the time of the accidental death of Mr. Villar, SATOL operated one of Crowley Maritime Corporation's vessels named the Tug "Bannock". The Tug "Bannock" was a Panamanian flag (of convenience) vessel dedicated to GTO and CMC/GTO sent the vessels to Saudi Arabia for use in the GTO/SATOL project. No contracts or charters between GTO and SATOL have ever been produced, or found, and GTO and its affiliates, including CMC retained control over the vessels, including the Tug Bannock.

10. Villar, though assigned to the Tug Bannock, was instructed to board Barge 204 and he was knocked off Barge 204 when it collided with the Tug Bannock. Barge 204 was owned by

CMC and/or one of its subsidiaries and carried the American flag.

11. At the present time, SATOL is not a viable and functioning corporate entity and therefore has no assets or means of service. WTO no longer does business in Saudi Arabia. Crowley Maritime continues, to this date, doing business in Saudi Arabia.

12. At the present time, GTO is now WTO Corporation, 100% of the stock owned by Crowley Maritime International S.A. who in turn is 100% owned by Crowley Maritime Corporation (CMC).

13. Based upon the affidavits of Rodrick MacKinnon of the Genstar group of companies and M.E. Chlumecky of the Federal Commerce group of corporations, I can now state that since the Villars filed their suit in

California, Genstar Corporation and Genstar Overseas Ltd. (the company that at one time owned 1/3 of GTO), have been dissolved and no longer exist and that Fednav, Ltd. has been merged with Federal Commerce Navigation.

14. I have reviewed all of the facts stated in Plaintiffs' Memorandum in Support of Motion to Remand and I hereby affirm that such facts are correctly stated and are supported by the depositions, documents and discovery listed above.

15. Therefore, based upon the facts mentioned above, the facts stated in Plaintiffs Memorandum in support of the Motion to Remand, my study of all the depositions and documents listed above, my independent investigation of the facts and circumstances, my

work in Saudi Arabia, my work and investigation in the Grunke/Cole cases and based upon knowledge, experience and expertise with regard to American maritime multi-national corporations and their related operations around the world, I hereby express the following opinions:

a. That, in view of the fact that SATOL, GTO, Genstar Corp., Genstar Overseas Ltd. and Fednav Ltd., had been dissolved, merged out, their assets transferred out and/or are no longer doing business, and that all this occurred <u>after</u> the accident made the basis of Villars suit took place and, in most instances, <u>after</u> such suit was filed, the separate corporate existence for these foreign corporations must

be disregarded in order to avoid an "inequitable result," namely the Plaintiffs being unable to collect their damages from these companies and being unable to obtain vital evidence which, prior to their dissolution and disorganization, said foreign subsidiaries had in their possession or control. The Plaintiffs should therefore be able to look to CMC, the ultimate parent and entity in control of the Saudi Arabian lighterage operations, as the entity that was the direct and indirect parent of SATOL and GTO and in control of the two Genstar companies Fednav Ltd., insofar as the Saudi Arabian operations were concerned.

b. The corporate fiction of SATOL, GTO, Genstar Corp., Genstar Overseas Ltd. and Fednav Ltd., should be disregarded in favor of CMC because those foreign corporations insofar as the relevant Saudi Arabia operations were concerned, were "used as a means of perpetrating fraud" upon the Plaintiffs. This occurred by reason of the dissolution of the corporations, thus precluding collection of any judgment from them obtained by Plaintiffs, and because of their dissolution and disorganization and their control over relevant evidence, the prosecution of Plaintiffs' claims has become much more difficult.

c. The corporate fictions of the foreign subsidiaries and corporations SATOL, GTO, CMI, S.A., Genstar Corp., Genstar Overseas Ltd., Fednav Ltd., Federal Commerce & Navigation, Federal Pacific Ltd, and Fednav International Ltd., should be disregarded insofar as the Saudi Arabian lighterage operations is concerned and should be disregarded in favor of CMC, the ultimate parent and/or affiliate in control of such operation, because these foreign corporations were "operated as a mere tool or business conduit" of CMC.

d. That, for the purposes of in personam jurisdiction, CMC is the alter ego of SATOL, GTO CMI,

S.A., Genstar Corporation, Genstar Overseas Ltd., Federal Commerce & Navigation, Federal Pacific Ltd., and Fednav International Ltd. and vice-versa, because the primary employers who operated and managed the subsidiaries concerning the Saudi Arabia lighterage operations were CMC employees; CMC controlled all corporate services and most of the day to day activities of these foreign corporations, as those activities related to the Saudi Arabian lighterage operations; there were interlocking officers and directors insofar as their activities related to the Saudi Arabian lighterage operations

(through GTO); in numerous instances the corporate formalities of the foreign corporations were disregarded, CMC remained in control of most of the property and in the ultimate handling and control over the bank accounts of the Saudi Arabian lighterage operations; and the above listed foreign corporations were used for the ultimate personal purposes of CMC.

e. That corporate existence of the foreign corporations SATOL, GTO, CMI, S.A. and the Genstar and Federal Commerce corporations should be disregarded in favor of CMC because they are being used "as a means of evading (by CMC) an

existing legal obligation" of CMC; namely its obligations to Plaintiffs.

f. That the legal fiction of CMI, S.A. should be disregarded in favor of CMC, because CMI-S.A. has been used by CMC to register vessels under foreign flags (such as Panama); when in fact such corporation is a "corporation of convenience" and such registration and flags are "flags of convenience", and thus violate American maritime laws and statutes governing vessel regulations.

g. That CMC and GTO were doing continuous, systematic and substantial business in the state of Texas at all material times. With regard to GTO, we

point out the following testimony of John Maguire, the officer of CMC presented by Defendants in the California federal proceeding as having the most knowledge about the corporate relationships and corporate operations of CMC, its direct and indirect subsidiaries and the affiliates involved in the Saudi Arabia lighterage operations:

> "Reference: Maguire deposition taken on September 10, 1981.

Q. Does Crowley maintain an office in Houston?

A. Yes, Crowley has an office Houston. GTO had an office in Houston as well . . . .

Q. Is that not a subsidiary of

CMC?

A. Oh yes, but that would be just part of Crowley bag of tricks, you know.

Further affiant sayeth not."

_____

JOHN RUNION, Affiant

Supreme Court, U.S.
FILED
NOV 29 1993
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(3)

No. 93-702

In The

Supreme Court of the United States

October Term, 1993

NENITA S. VILLAR, et al.,

Petitioners,

v.

CROWLEY MARITIME CORPORATION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.

Faced both with the petitioners' motion to remand and the foreign defendants' motion to dismiss for lack of personal jurisdiction, the district court ruled that it had the discretion to consider the motion to dismiss first. The court ruled that the plaintiffs had failed to make a prima facie showing that the foreign defendants were subject to jurisdiction in Texas. In the alternative, the court ruled that if it considered the motion to remand first, the defendants had shown there was no possibility that the foreign defendants were subject to jurisdiction in Texas. Does the alternative ruling, which petitioners have ignored, render moot petitioners' contention that the district court should have considered the motion to remand first?

2.

A. Did the district court abuse its discretion in denying petitioners' request for additional discovery, where at the time of the denial the case had been litigated for over ten years in three different courts?

B. Did the district court abuse its discretion in disregarding the affidavit of John Runion, which the district court found utterly untrustworthy and improper because the witness was a non-lawyer whose affidavit was replete with legal conclusions that were based on blatant misrepresentations of the evidence?

QUESTIONS PRESENTED FOR REVIEW – Continued

3.

A. Where this case was properly removed from state court, did the federal district court properly dismiss for *forum non conveniens*, rather than return the case to state court?

B. Did the federal district court properly apply federal *forum non conveniens* law?

C. Should this Court conduct a sweeping reexamination of the doctrine of *forum non conveniens*?

4.

Did the district court abuse its discretion in imposing sanctions on petitioners' counsel for making unreasonable arguments unsupported by the law or the facts and for relying on an affidavit that contained blatant misrepresentations that were either known to counsel or were easily discoverable?

LIST OF PARTIES

Nenita S. Villar

Josephine Villar

Gerardo Villar

Reynaldo Villar

Renerio Villar .....Petitioners

Crowley Maritime Corporation

GTO Corporation

Genstar Corporation n/k/a WTO Corporation

Fednav Ltd., Successor in Interest by Merger to Federal Commerce & Navigation, Ltd.

Federal Pacific Ltd.

Ross Insurance Limited, Successor in Interest to Genstar Overseas, Limited

Saudi Arabian Transport Organization Ltd.....Respondents

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NENITA S. VILLAR, et al.,

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents, Crowley Maritime Corporation, Crowley Maritime International, S.A., GTO Corporation, n/k/a WTO Corporation, Genstar Corporation, Fednav Ltd. (successor in interest by merger to Federal Commerce & Navigation, Ltd.), Federal Pacific Ltd., Ross Insurance Limited (successor in interest to Genstar Overseas Limited) and Saudi Arabian Transport Organization Ltd., file this brief in opposition to petitioners' petition for certiorari.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 990 F.2d 1489 and is reproduced in petitioners' appendix, A88-A144.

The opinion of the United States District Court for the Southern District of Texas is reported at 780 F. Supp. 1467, and is reproduced in petitioners' appendix, A1-A87.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners contend this case concerns the construction and application of 28 U.S.C. §§ 1359, 1441, 1446, 1447; §§ 17.044 and 71.031, Texas Civil Practice and Remedies Code; and § 1396-8.13 and 8.13(7), Tex.Rev.Civ.Stat.Ann. This case does not concern the construction of any of those statutes. Nowhere in the opinions below are those statutes construed.

STATEMENT OF THE CASE

(i) Procedural History and Disposition in the Courts Below:

Petitioners' Statement of the Case is inaccurate and incomplete. Petitioners ignore the fact that the lower court decisions were based on alternative grounds, which render moot many of the arguments raised by petitioners. In addition, petitioners have grossly misstated and mischaracterized the undisputed evidence in this case, particularly the evidence regarding the interrelationships

among the defendants. The opinions of the courts below accurately set forth the facts, which are in many important instances diametrically opposed to the statements of the petitioners.

This is the third successive suit petitioners have brought in United States courts for the death of Renerio Villar, a Philippine seaman who drowned in Saudi Arabian waters in March, 1977. Plaintiffs are the survivors of the decedent. Petitioners brought their first suit on February 27, 1980 in the United States District Court for the Northern District of California. After extensive discovery, conducted in part by petitioners' present counsel, Benton Musselwhite, that court found that Philippine law governed the case and dismissed for *forum non conveniens* on August 14, 1984. That dismissal was conditioned upon the defendants' agreement to waive all jurisdiction, venue and statute of limitations defenses in the Philippines, provided the plaintiffs refiled in the Philippines within one year. The Court of Appeals affirmed that decision on February 14, 1986. *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478 (9th Cir. 1986). Rather than comply with the federal court's directions, the petitioners next filed suit on April 8, 1986 in California state court. The trial court dismissed for *forum non conveniens* and the California Court of Appeals on December 17, 1990 affirmed in an unpublished opinion.

Petitioners again eschewed filing in Philippine courts and instead filed the present suit in Texas state court on February 14, 1991. Respondent Crowley Maritime Corporation ("CMC"), a Delaware corporation with its principal place of business in California, promptly removed the case to federal court on diversity grounds. CMC alleged

that the numerous foreign corporations petitioners had named as defendants were not subject to personal jurisdiction in Texas and were fraudulently joined to defeat diversity. After the suit was removed the foreign defendants moved to dismiss for lack of personal jurisdiction, and CMC moved to dismiss for *forum non conveniens*. Petitioners moved to remand.

Faced with the foreign defendants' motion to dismiss and the petitioners' motion to remand, the district court exercised its discretion to rule first on the motion to dismiss. The court held that the plaintiffs had failed to make a prima facie showing that the defendants were subject to jurisdiction in Texas. However, the court alternatively ruled that even if it considered the motion to remand first, the defendants had shown there was no possibility that the foreign defendants were subject to personal jurisdiction in Texas. Having disposed of those motions, the court ruled that the motion to dismiss for *forum non conveniens* should be granted, based on the *res judicata* effect of the prior California dismissals, and in the alternative, based upon an independent examination of the *forum non conveniens* issue by the court.

The district court denied the petitioners' request for additional discovery on the jurisdictional questions because there had been extensive discovery on the same factual matters in the California litigation. Recognizing that the *forum non conveniens* issue and the jurisdictional issues were not identical, the court nevertheless found that the evidence developed in the California litigation related to both issues. In another evidentiary ruling, the court found that the affidavit of John Runion, submitted by the petitioners as their chief evidence concerning the

jurisdictional issue, was completely untrustworthy and unsatisfactory. Runion, testifying as a supposed expert, was not a lawyer. But his affidavit was replete with legal conclusions, including his opinion that CMC was the "alter ego" of the alien defendants, and that the alien defendants were "doing business" in Texas. The district court found Runion was not competent to render those opinions and, further, that those opinions were based on blatant misrepresentations of the evidence and wholly unwarranted assumptions of facts.

Lastly, the district court imposed sanctions on petitioners' counsel for making numerous frivolous arguments that were not supported by the facts or the law and for submitting Runion's affidavit, which contained misrepresentations that were known to counsel or that were easily discoverable.

The Fifth Circuit affirmed in all respects. The Fifth Circuit ruled that the district court had the discretion to consider first the motion to dismiss for lack of personal jurisdiction, rather than the motion to remand. Petitioners argued there, as they do in their present petition, that by considering the motion to dismiss first, the district court placed an improper burden on them to prove a prima facie case of jurisdiction, whereas if the district court had considered the motion to remand first it would have required the defendants to prove there was no possibility the foreign defendants were subject to jurisdiction in Texas. The Fifth Circuit ruled that this argument overlooked the plain fact that the district court ruled in the alternative that the defendants had proved there was no possibility that the foreign defendants could be subjected to personal jurisdiction in Texas. The court ruled the

district court had not abused its discretion in denying the plaintiffs additional discovery or in refusing to give any credit to the affidavit of Runion.

On the merits of the jurisdictional issue, the Fifth Circuit affirmed the district court because the foreign defendants did not have sufficient minimum contacts with Texas and, further, subjecting the foreign defendants to jurisdiction in Texas would offend traditional notions of fair play and substantial justice. The Fifth Circuit ruled that the district court had properly applied federal *forum non conveniens* law and had properly dismissed.

The Fifth Circuit ruled that, assuming the district court had the discretion to remand rather than dismiss for *forum non conveniens*, there was no abuse of discretion in choosing to dismiss. Finally, the Fifth Circuit found no abuse of discretion in sanctioning the petitioners' counsel, who continued in the Fifth Circuit to make the same frivolous arguments they had made to the district court. Petitioners persistently repeat those same arguments in this Court.

(ii) Statement of the Facts:

Petitioners' Statement of Facts is in truth a succession of highly argumentative legal conclusions that have no basis in the uncontradicted facts. For example, petitioners repeatedly mischaracterize the foreign defendants as "subsidiaries" of CMC, when both of the lower courts have ruled that there is no basis whatever for such a conclusion. Respondents will not unduly lengthen this brief by attempting to point out every misstatement and

mischaracterization of the evidence by petitioners. The evidence is accurately recounted in detail in the district court's opinion, 780 F. Supp. at 1471, 1478-79; app. A3-A7, A38-A43). The actual facts are uncontradicted and unassailable.

At the time of his death Renerio Villar, a citizen of the Philippines, was employed by Saudi Arabian Transport Organization, Ltd. ("SATOL"). He was assigned to the Tug BANNOCK, a Panamanian flagged vessel. Sixty percent of SATOL's stock was owned by GTO Corporation ("GTO"), a Liberian corporation, and the other forty percent was owned by Yusuf Bin Ahmed Kanoo ("Kanoo"), a Saudi Arabian corporation. None of the defendants had any ownership interest in Kanoo. GTO was part of a larger joint venture between Crowley Maritime International, Inc. ("CMI"), Genstar Overseas, Ltd. ("Genstar Overseas"), and Federal Pacific Ltd. ("Federal Pacific").[1] The undisputed evidence showed that CMC did not dominate either SATOL or GTO. SATOL had eight directors, only two of which were connected to CMC. The other six directors were supplied by the other three owners, who each supplied two directors. GTO had seven directors,

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[1] CMI was an inactive Panamanian corporation that was a subsidiary of CMC. Genstar Overseas was a Bermuda corporation that was a wholly-owned subsidiary of Genstar International, S.A., a Luxembourg corporation. Genstar International was subsequently wound up and merged with Ross Insurance, Ltd., a Bermuda corporation. Federal Pacific is a Bermuda corporation, which had no connection with Federal Commerce & Navigation Ltd. at all until the latter was acquired by Fednav Ltd., the parent of Federal Pacific. The district court's opinion, 780 F. Supp. at 1471, app. A3-A7, details these relationships.

and only three of those were supplied by CMC. Two of those had no voting privilege, and any action could be taken only by unanimous agreement of all the directors. As the district court found on undisputed evidence, these entities maintained the formalities of incorporation, had their separate bank accounts, their own staff, and their own payroll. CMC did not control the day-to-day operations of SATOL. The sole connections between these entities is that CMI, Genstar Overseas and Federal Pacific contributed some personnel and some equipment to the joint venture.

REASONS THE WRIT SHOULD BE DENIED

1. Petitioners' Principal Arguments Are Rendered Moot by the Alternative Rulings.

Petitioners' petition should be denied because the decision of the Fifth Circuit is clearly correct, and furthermore, the issues raised in the petition do not meet the criteria for review by this Court.

The arguments raised by petitioners fall into three categories. First, they attack rulings that were in fact part of alternative holdings by the lower courts, which the petitioners studiously ignore. Once those alternative rulings are acknowledged, it becomes apparent that the petitioners' principal arguments are moot. Second, they attack rulings of the district court that are subject to an abuse of discretion standard, and the Fifth Circuit has already ruled there was no abuse of discretion. Third, they unabashedly ask this Court to engage in a sweeping review of firmly established legal concepts, such as the

entire doctrine of *forum non conveniens*. The Fifth Circuit rightly labeled many of the petitioners' arguments as "frivolous". Yet, petitioners repeat those arguments in this Court and couple those arguments with repeated assertions that the lower courts' view of the evidence is wrong. Petitioners clearly misperceive the role of this Court. As this Court has instructed, its role is not "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). It is the role of this Court to take up unsettled legal issues that are "of importance to the public, as distinguished from that of the parties . . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). These precepts are embodied in Rule 10 of the Supreme Court Rules, which sets the standards for granting a writ of certiorari. None of the issues raised by petitioners satisfy that test.

The first issue raised by petitioners, which dominates the petitioners' petition, is whether the district court erred in addressing the motion to dismiss for lack of personal jurisdiction before addressing the motion to remand. Petitioners argue that by addressing the motion to dismiss first, the district court imposed an unfair burden on them to prove a prima facie case for the exercise of personal jurisdiction over the foreign defendants, whereas if the district court had addressed the motion to remand first the defendants would have been required to prove there was no possibility the foreign defendants could have been subjected to jurisdiction in Texas. As the Fifth Circuit pointed out, in making that argument the petitioners ignore the fact that the district court

addressed those two motions in the alternative. The district court properly exercised its discretion to first consider the motion to dismiss, as the Fifth Circuit ruled. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 193 (1992); *Walker v. Savell*, 335 F.2d 536, 539 (5th Cir. 1964)[2]. But the district court did not stop there. The district court held in the alternative that if it considered the motion to remand first, the defendants proved there was no possibility that the foreign defendants were subject to personal jurisdiction in Texas. As the Fifth Circuit observed, that alternative ruling effectively renders moot petitioners' arguments concerning the proper sequence of decision on the two motions:

> Even if we could overrule our holding in *Walker* and require the district court to rule on the Villars' motion to remand first, the Villars' argument would still fail because the district court did as the Villars asked it to do: It applied the standard the Villars suggested and, alternatively, held that there was no possibility that the Villars could prove that the court had personal jurisdiction over the foreign defendants. The district court then denied the Villars'

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[2] Petitioners argue that *Walker v. Savell, supra*, is at odds with *Allen v. Ferguson*, 791 F.2d 611 (7th Cir. 1986). This clearly is not true, as the Fifth Circuit explained. The court in *Allen* ruled that a motion to dismiss should be considered before a motion to remand only where the state court could not obtain jurisdiction over the nondiverse defendant, as opposed to where there was simply a defect in process or the like. The lack of jurisdiction in the present case is not based on a defect in process, but is based instead on the lack of minimum contacts.

> motion to remand because the Villars had fraudulently jointed the non-diverse foreign corporations to defeat the district court's diversity jurisdiction.

990 F.2d at 1494-95; app. A102-A103.

The petitioners refuse to acknowledge that the very procedure and burden they advocate was in fact applied by the district court and affirmed by the Fifth Circuit. Their complaints on this point are moot.

There clearly was no possibility that Texas courts could have constitutionally subjected the foreign defendants to *in personam* jurisdiction, because the foreign defendants lacked sufficient minimum contacts with Texas. There are two types of *in personam* jurisdiction, specific and general. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). In this case the petitioners relied on general jurisdiction. Further, to establish general jurisdiction, they relied on the foreign defendants' relationship to CMC to establish that jurisdiction. According to petitioners, CMC was the alter ego of all of the foreign defendants. The flaw in that position is that the undisputed evidence showed conclusively that CMC was not the alter ego of the foreign defendants. Respondents will not rehash the petitioners' arguments, all of which are based on palpably erroneous legal propositions and distorted views of the evidence. The opinions of the district court and the Fifth Circuit accurately review these matters and summarily dispose of the petitioners' arguments.

780 F. Supp. at 1475-80, app. A25-A47; 990 F.2d at 1496-97, app. A110-A116.[3]

2. The District Court Did Not Abuse Its Discretion in Denying Additional Discovery on the Jurisdictional Issue or in Disregarding the Affidavit of John Runion.

Petitioners assert two errors that are subject to review under an abuse of discretion standard. The Fifth Circuit ruled there was no abuse of discretion in refusing to permit petitioners to engage in additional discovery on the jurisdictional issue, and there was no abuse of discretion in disregarding the affidavit of John Runion. Petitioners never acknowledge the appropriate standard of review and, therefore, do not address the question

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[3] One of the arguments the Fifth Circuit labeled as "frivolous" is the proposition that GTO had sufficient minimum contacts with Texas because at the time of the accident GTO had an office in Texas. As the Fifth Circuit noted, that argument ignores the undisputed fact that GTO closed its office prior to the institution of this case and ended any contact with Texas. 990 F.2d at 1496, n. 6; app. A110 n. 6. Similarly frivolous is petitioners' contention that because Fednav's vessels may have visited Texas ports a few times over the span of several years, Fednav is subject to general jurisdiction in Texas. None of the contacts are sufficient to show the type of systematic and continuous contacts that would subject these defendants to general jurisdiction in Texas. Moreover, both the district court and the Fifth Circuit ruled that subjecting the defendants to jurisdiction in Texas would violate due process because it would "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Petitioners have not even addressed that point in this Court.

whether there was an abuse of discretion. What petitioners are now asking is for this Court to review these issues, which are consequential to the present case only. These are not issues that warrant the granting of a writ of certiorari. Moreover, it is plain that the lower courts made the right rulings.

A. Both the district court and the Fifth Circuit acknowledged that the question of personal jurisdiction is not synonymous with the question of *forum non conveniens*. Both courts, however, realized that the evidence developed in the discovery that took place during the ten year pendency of this case in California was relevant to both issues. Despite that discovery, the petitioners have been unable to uncover any connections between the foreign defendants and Texas that would allow personal jurisdiction over these foreign defendants.

B. Unable to muster any concrete evidence, petitioners resorted to hiring John Runion, who purported to be an expert on international business matters. Despite considerable investigation, he too was unable to discover any factual evidence that would connect the foreign defendants to Texas. His affidavit, charitably put, is long on opinions and short on facts. Even though he possesses no legal expertise, he opined on numerous legal issues. He based those opinions on gross misstatements of the evidence and on unsupported assumptions of fact. The district court correctly disregarded that affidavit, which was the backbone of the petitioners' alter ego arguments. There was no evidence whatever that would have allowed a court to conclude that CMC was the alter ego of any of the foreign corporations.

3. The Fifth Circuit Correctly Affirmed the District Court's Dismissal for *Forum Non Conveniens*.

A. Petitioners raise a number of arguments about why the lower courts erred in dismissing this case for *forum non conveniens*. The first of those arguments is that the federal district court, rather than dismissing, should have remanded the case to state court. According to petitioners, justice demands that course. This argument neatly overlooks the fact that this is the third time this case has been dismissed by United States courts for *forum non conveniens*. Petitioners are essentially arguing that they should be allowed to go on a forum shopping expedition across the courts of this country until they find some court willing to hear their case. To allow that would nullify the three prior dismissals for *forum non conveniens*, which found that no court in the United States was a convenient one in which to try this case.

To accomplish their desired result, petitioners advocate a rule of law that would prevent a federal district court from ever dismissing a removed case for *forum non conveniens*. However, the authorities on which they rely hold simply that in a removed case a federal district court at times has discretion to remand rather than dismiss. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); *Murray v. Union Pac. Ry. Co.*, 77 F. Supp. 613 (N.D. Ill. 1948). To succeed under those cases, the petitioners would have to prove that the district court abused its discretion in dismissing, rather than remanding. Considering the history of this case, no one can seriously argue that the district court abused its discretion in following the same course as the California federal and state courts.

Moreover, that is not an issue worthy of review by this Court.

B. Federal *forum non conveniens* law applies to cases in federal court. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1068 n. 11 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1587 (1991); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *affirmed in relevant part*, 883 F.2d 17 (5th Cir. 1989). Petitioners do not dispute this rule but contend it should not apply in a case removed from state court. In petitioners' world, in a suit filed initially in federal court on diversity grounds, federal *forum non conveniens* law should apply, but in a case removed from state court on diversity grounds, state *forum non conveniens* law should apply. Petitioners offer no logic and no authority for this facially absurd rule. Furthermore, as the Fifth Circuit observed (990 F.2d at 1498; app. A121-A122), in making the argument petitioners overlook the fact that this case had already been dismissed under federal standards in the prior California federal case.

C. Petitioners invite this Court to engage in a sweeping reexamination of the entire doctrine of *forum non conveniens*. According to petitioners, much has changed since the decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Petitioners point to advances in telecommunications and the like. What petitioners do not explain is why the courts of the United States should become the courthouse to the world. Furthermore, they offer no alternative test. When their arguments are closely examined, it is apparent that they are simply complaining about the application of established *forum non conveniens* standards

to the facts of this case. The reason petitioners wish to litigate this matter in the United States has been recognized by the courts the world over: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730 (1982), quoted in *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 290 (5th Cir. 1984). That much has not changed and is a compelling reason for continuing to apply *forum non conveniens*.

Petitioners offer no rationale for allowing this case to proceed in the courts of the United States, and they do not explain why the whole doctrine of *forum non conveniens* should be reexamined.

4. The Fifth Circuit Correctly Ruled That the District Court Did Not Abuse Its Discretion in Imposing Sanctions on Petitioners' Counsel.

The district court imposed sanctions on petitioners' counsel for two reasons. First, petitioners' counsel made numerous frivolous arguments that were not supported by existing law or the facts. The Fifth Circuit observed, for example, that petitioners' alter ego argument was utterly at odds with the facts and the law. Second, petitioners submitted an affidavit that contained blatant misrepresentations of the evidence, which was either known to counsel or could have been easily discovered. This decision by the district court is reviewable under an abuse of discretion standard. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990). The Fifth Circuit ruled that the district court had not abused its discretion. Petitioners do

not dispute the law under which the sanctions were imposed. Instead, they argue that imposing sanctions under the facts of this case will chill innovative advocacy. Innovative advocacy does not include making frivolous arguments that have absolutely no support in existing law or in the undisputed facts. Nor does it include submitting affidavits containing misrepresentations. Again, this is not the kind of issue that is worthy of review by this Court.

CONCLUSION

There is no reason to grant a writ of certiorari in this case. The decision of the Fifth Circuit is correct, is based on settled legal principles, and is not in conflict with any other circuit court of appeals. The writ should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-702

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NENITA S. VILLAR,
et al,

Petitioners

v.

CROWLEY MARITIME CORPORATION, et al,

Respondents

Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION FILED BY RESPONDENTS

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GTO Corporation, n/k/a WTO Corporation, Respondent

Genstar Corporation, Respondent

Fednav Ltd., Successor in Interest by Merger to Federal Commerce & Navigation Ltd., Respondent

Federal Pacific Ltd., Respondent

Ross Insurance Limited, Successor In Interest to Genstar Overseas, Limited, Respondent

Saudi Arabian Transport Organization Ltd., Respondent

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION FILED BY RESPONDENTS

Petitioners hereby respond to Respondents Brief In Opposition to Petitioners' Petition for Writ of Certiorari as follows:

I. Reply To Respondents Discussion of the Alleged "Facts" in This Case

The Respondents discussion of the "facts" in this case is, plainly stated, fallacious and superficial. The Respondents have simply employed the approach utilized by the district court and the Panel Majority of the Court of Appeals. Though admitting, in the fraudulent joinder context, that the burden was upon the Respondents to prove by "clear evidence" that there was "no possibility" that any one of the seven alien defendants could have been found by the state court to have been subject to the in personam jurisdiction of the Texas courts, they have finessed this burden in three ways:

(1) Through giving lip service to the foregoing proper burden, the district court and the Panel Majority have in fact decided, and the

Respondents have in fact argued, that the burden is upon the Petitioners rather than the Respondents and that that burden is one that even exceeds the "prima facie" burden discussed by the district court, see A55-57, and the Panel Majority, A95, 96; they have in fact imposed a preponderance of the evidence burden upon the Petitioners. This is demonstrated by the way in which the courts below have gleaned out of the record, and only mentioned, the evidence that is favorable to the Respondents. For example, compare the district court's recitation of the "evidence", A38-A43, to that of Petitioners', pp. 12-21 of the Petition, the latter containing a specific citation to the records, depositions and affidavits.[1]

(2) In improperly applying a "preponderance of the evidence" standard, rather than a "prima facie" or "no possibility" standard, the district court, Panel Majority and

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[1] It is important to note that the Respondents did not question or challenge any of the Petitioners' citations to the record about the evidence before the district court. See entire Brief In Opposition.

Respondents, in violation of this Court's admonitions in Wilson v. Republic Steel, 42 S.Ct. 35, (1921), utilized conclusory, general and superficial statements to the effect that there was no alter ego, agency or other relationship between the Texas registered parent, CMC, its subsidiaries or related companies, CMI, GTC and/or SATOL. The courts below and Respondents did not pierce these conclusory statements with an analysis in depth of the evidence.

(3) Then, in an attempt to gloss over what was, in fact, a finesse of the "no possibility" rule, the courts below made astounding statements that, "in the alternative", the Respondents had somehow "clearly" shown that there was "no possibility" that, under state and federal law on alter ego, agency and joint actions,[2] a state court could have found that any one of the seven alien defendants was subject to the in personam

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[2] We noted in the Petition how the Panel Majority blatantly misconstrued Texas state law on the question of alter ego, see footnote 17 at p. 42, 43 of the Petition, and the Respondents did not, in their Brief In Opposition, attempt to refute Petitioners observation in that regard.

jurisdiction of the Texas courts. In making this shocking statement, the district court, see footnote 21 of district courts's opinion, A57, and the Panel Majority of the Court of Appeals, A96, did not deign to explain such conclusion and they inexplicably totally ignored the undisputed evidence that the CMC people occupied almost all of the managerial positions in CMI, GTO and SATOL, including those involving the day-to-day operations of the CMC/GTO/SATOL lighterage operation in Saudi Arabia.

The Respondents, in their Brief in Opposition, attempt to perpetuate and capitalize upon what has been a "fact finding" travesty by the courts below, by making these statements: (a) Respondents state that "petitioners repeatedly mischaracterize the foreign defendants as subsidiaries of CMC, when both of the lower courts have ruled that there is no basis whatever for such a conclusion". Yet, the district court conceded that, with respect to the three key alien defendant corporations, CMI, GTO and SATOL, CMC owned 100% of CMI, A4; CMC owned at least 33-

1/3% of GTO and, in 1979, became 100% owner of GTO (later called WTO), A5; and CMC owned at least 20% of SATOL. Indeed, in terms of percentages of de facto control, as distinguished from ownership, almost 100% of the managerial positions, including positions involving day-to-day operations, of CMI, GTO and SATOL were occupied by CMC people and this central reality, as described in the Petition, pp. 12-21, has never been refuted by the Respondents, see entire Brief In Opposition, the district court opinion, A1 to A87, or the Panel Majority of the Court of Appeals, A88 - A144.[3]

(b) Respondents then state that "(a)ccording to petitioners, CMC was the alter ego of all of the foreign defendants." See p. 11, Opp. Bf. That statement is a flat-out misrepresentation. As noted at pp. 12-21 of the

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[3] The Respondents did state that "(t)he undisputed evidence showed that CMC did not dominate either SATOL or GTO." But, again, the Respondents only talked in terms of directors and percentage of stock ownership, but did not ever confront the reality that almost all of the key managerial personnel were CMC people and that, through them, CMC indisputably dominated and controlled CMI, GTO and SATOL.

Petition, Petitioners never contended that Fednav, GenStar, FedPac or Ross Insurance Ltd. were subsidiaries of CMC. They or their affiliated companies were joint-venture owners in GTO which, at the time of the accident in question, was indisputably formally registered to do business in Texas. A15.

(c) Respondents next astoundingly state "that the undisputed evidence showed conclusively that CMC was not the alter ego of the foreign defendants." Again, the evidence described in the Petition at pp. 12-21, has never been refuted by Respondents and such evidence clearly demonstrates that the potential alter ego relationships between CMC and CMI, GTO and/or SATCL are at least factually disputed issues concerning which prima facie cases of alter ego exist. (d) Respondents also attempt to exploit the district courts' injudicious obsession and blatant misinterpretation of the Runion Affidavit. See p. 13, 16 of Bf. in Opp. Respondents do not contradict Petitioners proper analysis of that affidavit. See pp. 14, 15 ("...

the affidavit of John Runion was never contradicted by defendants"), 21 and 40-42, including footnote 16, of the Petition.[4]

Indeed, even if the affidavit were ignored, the depositions of CMC's own employees (Messrs. Maguire, Watkins and McLean) more than establish a prima facie case of in personam jurisdiction over CMI, GTO and SATOL through principles of alter ego, agency, joint contacts, the "business conduit" rule, the inadequate capitalization concept, and the "working of an injustice" doctrine (through transfer of assets after the

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[4] The district court only identified two specific complaints – that Mr. Runion should not have omitted a phrase from the quoted portion of the Maguire deposition and that he expressed legal opinions. A49-51, A82-83. But the district court admitted that the omission was obvious (because of the . . .); the district court referred to it as an "easily discoverable" omission, A83). Mr. Runion, in his affidavit, gave the legal definition of alter ego and the other legal terms that were used by him in expressing his opinions so that the bases for his opinions were easily ascertainable. See A161-191. In short, the Respondents engage in judicial McCarthyism by stating that Mr. Runion based his opinions "on gross mis-statements of the evidence . . . ". Again, the only alleged "misstatement" referred to by the district court, the Panel Majority of the Court of Appeals or Respondents was the omission in the quote from the Maguire deposition, which omission was identified by the . . . The use of the term "gross misstatement" was, to put it bluntly, a gross overstatement. For an accurate assessment of what Mr. Runion had to say as to matters that were relevant, see Petition at 21, 40-42 and affidavit at A161-191.

accident in question). See pp. 12-21, 39-46 of Petition.

II. This Court's Decisions Concerning Grant of Certiorari on Issues Similar To Those Involved In This Case

A. Factual Determinations. The Respondents cite United States v. Johnston, 268 U.S. 220, 227 (1925) for the proposition that this Court's role is not "to review evidence and discuss specific facts". Bf. in Opp. at 9. However, the Court, having said that, went on in United States v. Johnston to undertake, in a fashion, essentially a factual consideration of the issues. 268 U.S. at 227. And the Court has not hesitated in the past to take a realistic view of the evidentiary posture of a case in granting certiorari. See Bose Corp. v. Consumers Union, 466 U.S. 485, 499, 511 (1984); Workman v. New York City, 179 U.S. 582, 555 (1900) (even though both lower courts have concurred in a finding of fact, it will not, in the Supreme Court, be accepted as conclusive if it appears "that the lower courts obviously erred"); Mayor of Philadelphia v. Educational

Equality League, 415 U.S. 605, 621, nte. 20 (1974) (the Court can, in an appropriate situation, determine whether the court of appeals applied a proper fact review standard and then apply that standard to the findings of the district court); Universal Oil Products Co. v. Globe Oil & Ref. Co., 332 U.S. 471, 473 (1944); Great Atlantic & Pacific Tea Co. v. Supermarket, 311 U.S. 377, 403-404 (1940) (lower court findings rejected; "(B)oth the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied"); Baumgartner v. U.S., 322 U.S. 665, 670-671 (1944) (refused to apply two-court rule because it "does not relieve us of the task of examining the foundation for findings in a particular case . . . The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment ... Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by

this Court"); and Furnco Construction Co. v. Waters, 438 U.S. 567, 98 S.Ct. 2943-46 ("We granted certiorari to consider important questions raised by this case regarding the exact scope of the prima facie case . . . and the nature of the evidence to rebut such a case"; and "We granted certiorari to consider whether the Court of Appeals had gone too far in substituting its own judgment. . .").

In this case, the fraudulent joinder issue involves a question of standards ("no possibility" or prima facie or preponderance of evidence), the application of the appropriate standard to the evidence, and a determination of the conclusions that may appropriately be drawn from the "whole mass of evidence". Moreover, the questions of law that need to be reviewed are, in certain respects, inseparable from the particular facts to which they are applied. Indeed, the claim by Respondents that this Court should accept the "findings" of the district court must pale before the obvious superficiality and shallowness of the alleged findings – they are

nothing more than "summary characterizations", as in Baumgartner, that blatantly ignore the mass of the evidence produced concerning the almost total domination of the CMC/GTO/SATOL lighterage operations by CMC.

B. Conflicts With the Holdings of This Court. Moreover, the holdings by the lower courts in this case with regard to fraudulent joinder disregard the substance and the spirit of this Court's holding in Wilson v. Republic Steel. Conflicts with this Court's holding — have repeatedly been considered sufficient grounds, in themselves, for granting certiorari. See Foucha v. Louisiana, 112 S.Ct. 1780 (1992) ("Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari"); Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 1934 (1987) ("Because the decision below appeared to misconstrue our decision in Rhode Island v. Innis . . . we granted the petition ..."); and Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural

Resources, 112 S.Ct. 2019, 2023 (1992) ("We granted certiorari . . . because of concern that the decision below was inconsistent with" an earlier decision of the Court).

C. Conflict Among the Federal Courts. In addition, we pointed out in the Petition the numerous crucial issues concerning which the holdings of the courts below in this case are in conflict with other federal decisions. This Court has frequently noted how important it is for the Court to resolve conflicts among the federal courts in order to maintain a uniformity in the law. See Chick Kam Choo v. Exxon, 486 U.S. 140, 108 S.Ct. 1684 (1988) (granting certiorari because of conflict between circuit courts concerning injunctions in forum non conveniens cases); Evans v. U.S., 112 S.Ct. 1881, 1883 (1992); U.S. v. Burke, 112 S.Ct. 1867, 1870 (1992); Wyatt v. Cole, 112 S. Ct. 1827, 1829 (1992); and Marks v. U.S., 430 U.S. 188, 97 S. Ct. 990 991 (1977).

These conflicts include:

(1) The important question, which this Court has

recognized as important but has pretermitted because of the absence of a conflict in past cases between state and federal law, see Gulf Oil v. Gilbert, 67 S.Ct. 839 (1947) and Piper Aircraft v. Reyno, 454 U.S. 235 (1981), of whether state or federal forum non conveniens law applies in a diversity case tried in federal court.[5]

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[5] In this regard, the Respondents make another statement that is blatantly incorrect. They state in their Opposition Brief that: "Petitioners do not dispute this rule but contend it should not apply in a case removed from state court. In petitioners' world, in a suit filed initially in federal court on diversity grounds, federal forum non conveniens law should apply." Throughout this litigation, as Respondents well know, Petitioners have taken the position that the Fifth Circuit cases, Nolan v. Boeing Co., 919 F.2d 1058, 1068 n. 11 (5th Cir. 1990), cert denied, 111 S. Ct. 1587 (1991); and In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated on other grounds sub nom Pan Am World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989), affirmed in relevant part, 883 F.2d 17 (5th Cir. 1989), holding that federal forum non conveniens law applies in diversity cases even where the application of such federal law makes a difference in the outcome, are incorrect and conflict with Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945) and other federal authorities. We did argue that state forum non conveniens law should apply with even more force where the plaintiffs initially choose the state forum and are removed to federal court. See pp. 49-52 of Petition. But we have never conceded that Nolan, In Re Air Crash and this case were correctly decided on such issue and have always contended that state forum non conveniens law should apply in diversity cases, regardless of whether the plaintiffs initially choose the federal or state forum, as long as the application of federal forum non conveniens law (or the failure to apply state forum non conveniens law) would make a difference in the

(2) The issue of whether, when a federal court to which a case filed in state court has been removed, decides that it will reject jurisdiction over the case and dismiss it on grounds of forum non conveniens, it should remand instead of dismissing. See conflicting authorities discussed at pp. 46-48.

(3) The conflicts in the cases dealing with the questions surrounding the undisputed facts that GTO was formally registered to do business in Texas at the time of the accident in question; that, after the accident but before the filing of suit, GTO terminated its registration in Texas, transferred its assets to CMC and CMC acquired all of the stock of GTO; and the impact of those facts upon the removal/remand issue. See pp. Petition at 33-37. Respondent referred to the Panel Majority's characterization of the GTO facts as "frivolous" with a passing reference in a footnote. See footnote 3 at p. 12 of the Opp. Brief, referring to Panel Majority's opinion at

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outcome.

A110, nte 6. However, neither the Respondents nor the Panel Majority nor the district court ever confronted the issue of whether, under the holdings in such cases as Connecticut Mutual Life Insurance Co. v. Spratley, 172 U.S. 609 (1899) and Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) and other cases discussed at pp. 33-37 of the Petition, when considered with the Texas law on discontinuance of corporate registration id., GTO remains subject to the in personam jurisdiction of the Texas courts for the purposes of this lawsuit until the debt created by this lawsuit has been paid. The potential conflict with those authorities and the holding of the courts below, and the uncertainty in this area of the law, suggests the need for certiorari intervention.[6]

(4) Another area of the law in which there is direct conflict between the holdings of the

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[6] This Court has recurringly recognized the importance of issues dealing with removal/remand Wilson v. Republic, supra; Gay v. Ruff, 292 U.S. 25 (1934); Gravitt v. Southwestern Bell Telephone, 430 U.S. 723 (1977); and Finley v. U.S., 490 U.S. 545 (1989).

courts below and cases of this Court and of other federal circuits, is that dealing with the failure of the district court and the Panel Majority to allow Petitioners the right to engage in discovery. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guines, 456 U.S. 694, 709 (1982); the cases cited in the dissent in the Court of Appeals decision in this case (by Judge Johnson), A130-A144, and the Petition at pp. 30-33, inclusive of ftnte. 11, p 32. The Respondents, in notably failing to address Judge Johnson's piercing dissent, simply joined the refrain of the court below, see Bf. in Opp. at 12, 13, and never faced up to the undeniable fact that Petitioners, as Judge Johnson so correctly pointed out in his dissent, had never been given the opportunity to engage in discovery with regard to the question of whether the seven alien defendants were subject to the in personam jurisdiction of the Texas courts.

As noted in Compagnie des Bauxites, the question of discovery with respect to jurisdiction is sufficiently important to merit

grant of certiorari.

D. Importance of Issues as Grounds for Certiorari.

This Court has frequently granted certiorari on the ground that the issues are "important". See Burson v. Freeman, 112 S.Ct. 1846 (1992); Foucha v. Louisiana, supra; Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 102 S.Ct. 752, 757 (1982) ("Because of the unusually broad and novel view . . . adopted by the Court of Appeals, we granted certiorari").[7]

Our request that the Court reexamine the forum non conveniens doctrine; all the issues pertaining to removal/remand; the question of applicable forum non conveniens law in diversity cases; the right to discovery in fraudulent joinder cases; the question of sanctions in a

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[7] The Panel Majority's view that defendants can remove plaintiffs from their chosen forum on fraudulent joinder grounds; the federal district court can then refuse discovery on the issues pertaining to fraudulent joinder; and in refusing to remand, the court can ignore voluminous evidence establishing a prima facie case that the joinders were not fraudulent, is, we suggest, an excessively broad and novel holding, justifying the grant of certiorari.

case where the attorney's positions have all consisted of a reasonable effort to secure clarification of, or change in, existing law;[8] and all of the issues which the Petitioners have raised in this case are important, not just to Petitioners, but to the hundreds of litigants who are removed to federal court each year, who face forum non conveniens motions, who seek discovery in connection with removals, and who are sanctioned. They are also important to the bodies of law dealing with removal/remand and forum non conveniens.

For all of the foregoing reasons we

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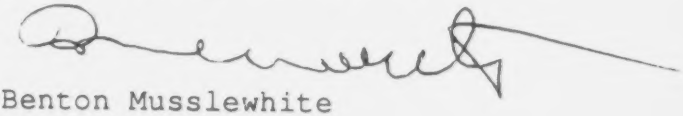
[8] The Respondents again wander beyond the bounds of reasonable advocacy. They state: "Innovative advocacy does not include making frivolous arguments that have absolutely no support in existing law or in the undisputed facts. Nor does it include submitting affidavits containing misrepresentations." True to form, Respondents never spell out just what those frivolous arguments are, except to mention "alter ego". It must be remembered that "alter ego" has been used to embrace several theories whereby the presence of a registered defendant can constitute also the presence of a non-registered subsidiary or related defendant. Petition at pp. 39-46. Petitioners' positions on these various alter ego theories are not only reasonable, but they are absolutely right. Respondents' claim that Petitioners' co-counsel submitted an affidavit containing misrepresentations is equally untenable. Omitting portions of an excerpt with a . . . in it does not constitute a misrepresentation.

respectfully submit that this Court should grant certiorari in this case.

Respectfully submitted,



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